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# The Inter-American Court of Human Rights: Emerging Patterns in Judgment Compliance

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THE INTER-AMERICAN COURT OF HUMAN RIGHTS:  
EMERGING PATTERNS IN JUDGMENT COMPLIANCE

Shelom Velasco

Submitted to the faculty of Indiana University Maurer School of Law  
in partial fulfillment of the requirements  
for the degree  
Doctor of Juridical Science  
May 2016

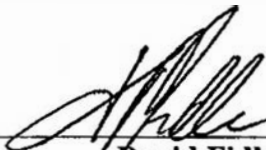
Accepted by the faculty, Indiana University Maurer School of Law, in partial fulfillment of the requirements for the degree of Doctor of Juridical Science.

Doctoral Committee



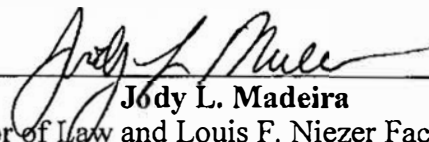
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## DEDICATION

I dedicate my dissertation work to my beloved husband, Rodrigo, for persevering with me throughout the time it took me to complete my research and write the dissertation. No one is more cherished and loved in this world than someone who lightens the burden of another. I am truly thankful for having him in my life. I have a special gratitude to my loving parents who have always loved me unconditionally and whose examples have taught me to persevere for the things that I aspire to achieve. They have been a constant source of support and strength all these years. My sisters, brothers in law, nephews and niece, have never left my side.

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Although just my name appears on the cover of this dissertation, I have been amazingly fortunate to have a great and generous friend who has contributed to its production. I owe my gratitude to Leslie Gabriele, who has made this dissertation possible. She has been a friend has always been there to listen and reinforce my work through several discussions. She gave me the guidance to clarify my thoughts. I am indebted to her for her efforts and patience to teach me how to question ideas, learn from my mistakes and overcome many crisis situations through these difficult years.

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## ABSTRACT

The Inter-American Court of Human Rights (ICHR) is one of the central institutions promoting adherence to fundamental human right norms in the Americas, yet States fully comply with only 5% of its judgments. This low rate of compliance threatens the Court's effectiveness and undermines the legitimacy of this regional human rights system. This dissertation analyzes the problem of noncompliance with ICHR judgments. Furthermore, it connects the problem of noncompliance and existing explanations in the ICHR with broader theories from the study of international relations in order to ground this regional case study in the larger debates about international legal norms in international politics. It is based on a qualitative analysis of 129 cases of the ICHR that examines court documents including judgments on merits, reparations, and cost; monitoring orders; and resolutions. Preliminary observations in my analysis indicate, counter-intuitively, that States acquiesce their international responsibility for human rights violations in ICHR proceedings have lower compliance rates with ICHR judgments than States that do not acquiesce responsibility. Specifically, the compliance rate for obligations that involve acquiescence is only 20% while the compliance rate for obligations that do not involve acquiescence is 50%. This observation is explained by analyzing the interaction between the States and the Court in the proceedings. I argue that acquiescence is the first step in a strategy designed to minimize consequences for high-level national authorities involved in a Court case of being threatened by an International Court judgment. Indeed, where the State strategy to protect authorities is unsuccessful, the amount of compliance that States will be willing to supply in cases is 1%. On the contrary, when the Court releases authorities from responsibilities by issuing restrained judgments and, accordingly, this State strategy turns into success the rate of compliance of cases with acquiescence is similar to the rate of compliance of those cases without acquiescence. The study also made apparent that cases with acquiescence were controlled in a much-diminished way by the Court in comparison with those non-acquiescence, intensely monitored cases. I conclude that these findings are not sufficiently considered by key theories of international relations. Based on this analysis, I propose statutory reforms that take into account the State-Court interaction process. These reforms extend from the stale, dominant paradigm of Court assistance and deterrence into alternative modes of negotiation to counteract noncompliance.

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# ***EMERGING PATTERNS IN JUDGMENT COMPLIANCE***

## **CHAPTER ONE: STATES, COURTS AND THE SURPRISING NONCOMPLIANCE PROBLEM**

### **I. INTRODUCTION**

In the 1960s, Louis Henkin presented what is, perhaps, the best-known argument for State compliance, asserting that most States comply with most international law most of the time, citing reputation, reciprocity and domestic policy.<sup>1</sup> His belief that efforts should focus on observing the overwhelming cases of compliance was one reason that theories shifted away from describing international law noncompliance, toward describing compliance.<sup>2</sup> While legal *norms* set the standard by which “compliance is gauged”<sup>3</sup> and Henkin’s idea that States almost always comply has been used to explain compliance, compliance with *judgments* of international Courts has received less attention than it deserves and even less attention has been paid to the phenomenon of noncompliance with international human rights courts’ judgments.<sup>4</sup>

In the Inter-American Court of HR’ (ICHR) the reality is that only 5% of the judgments are met with full compliance, while 86.04% of cases remain in the stage of

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<sup>1</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (Columbia University Press. 1979).

<sup>2</sup> Kal Raustiala & Anne-Marie Slaughter, *International law, international relations and compliance*, 32 *HANDBOOK OF INTERNATIONAL RELATIONS*, 538 (2002). The scholarly concern for explaining treaties is expressed at the beginning of their work, “We also focus primarily on compliance with treaties, rather than with the broader categories of rules [...] that international lawyers term ‘customary international law’.

<sup>3</sup> *Id.* at. They alluded more generally to IL, saying: “[...L]aw and compliance are conceptually linked because law explicitly aims to produce compliance with its rules: legal rules set the standard by which compliance is gauged.”

<sup>4</sup> *Id.* at. 538. The scholarly concern for explaining treaties is expressed at the beginning of their work, “We also focus primarily on compliance with treaties, rather than with the broader categories of rules [...] that international lawyers term ‘customary international law’.

monitoring.<sup>5</sup> The rate of overall compliance with the Court's international human rights judgments issued as of 2010 is below pre-1997 rates. Thus, in that span of time, the ICHR and its current compliance system has proven itself increasingly less, rather than more, capable of making human rights (HR) compliance obligatory. This suggests in very clear terms that, more than 32 years after the ICHR's first contentious case,<sup>6</sup> the Inter-American HR System's (HR System) purpose is still largely unrealized and its legitimacy threatened.<sup>7</sup> If it is true that "nowhere [is noncompliance] more evident or more problematic than in the field of HR law"<sup>8</sup> determining whether "HR make a difference"<sup>9</sup> requires moving beyond why States comply with international HR law to fully reckoning and explaining the phenomenon of noncompliance.

The work of previous scholars considers noncompliance mainly from the perspective of compliance when, indeed, compliance with norms shows different patterns that compliance with judgments: mostly compliance with norms mostly noncompliance with judgments. Each main International Relation (IR) theory (realism, institutionalism, liberalism and constructivism) addresses some characteristics of noncompliance. In

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<sup>5</sup> Inter-American Court of HR, Annual Report 2010, at 9-13 (henceforth 2010 Report). This report, the decisions and other Court documents are available at this web site: <<http://www.corteidh.or.cr>>. (This statistic was calculated on the basis of data from the Court's 2010. The report States that, of the 129 cases decided as of the end of 2010, 111 are being monitored. The remaining 8,96% are cases closed without monitoring and different reasons.

<sup>6</sup> The Velasquez-Rodriguez v. Honduras (Merits) 29 July 1988, ICHR, Ser. C No. 4 that was included in 1988 Annual Report, however it's important to clarify that the Court had previously ruled a contentious case inadmissible in the Viviana Gallardo et. al v. Costa Rica by Order dated September 8, 1983 as recorded in the 1984 Annual Report at 41.

<sup>7</sup> OAS, Official Records, OEA/Ser.K/XVI/1.1, doc. 65. Rev. 1, Corr. 2 (1970), opened for signature, Nov. 22, 1969, entered into force, July 18, 1978, reprinted in O.I.L.M. 673 (1970) and in Basic Documents Pertaining to HR in the Inter-American System, Updated to May 1996, OAS (1996) at 25/ Given the reality exhibited here, failure to modify the system will endanger the ICHR's future and the achievement of its purpose: consolidation of justice based on respect for each man's and woman's HR, especially for victim rights.

<sup>8</sup> Oona A Hathaway, Do human rights treaties make a difference?, 111 THE YALE LAW JOURNAL, 1938 (2002). Discussing the different theories of compliance, Hathaway has noted that "[t]he disinclination of international lawyers to confront the efficacy of international law is nowhere more evident—or more problematic—than in the field of HR law."

<sup>9</sup> Douglass Cassel, Does international human rights law make a difference, 2 CHI. J. INT'L L. (2001).

addition, the theories are not always compatible, even when taken cumulatively; they leave gaps in our understanding about noncompliance.

Specifically, IR theories recognize the interaction between the actors involved in compliance and noncompliance. In this interaction, the Court as a “norms-motivated actor”<sup>10</sup> has assigned it *some* tactics to increase the probability that its judgments will be upheld. The Court may act strategically because noncompliance is costly to the system and its “position [within the] system.”<sup>11</sup> However, other than recognizing that international institutions (such as Courts and their judgments) are the forum for norm articulation and enforcement, IR theories fail to fully acknowledge or explain that Courts have a role in the interaction with States to impact ideas about noncompliance (e.g., participation in state strategies). This is why IR theories do not systematically account how the exercise of the relationships between States and Courts may affect the structure and dynamic of noncompliance, including the role that ideas might play.

Furthermore, the states’ and Court’s roles in the process of judgment noncompliance has not received the same systematic scholarly attention. The researchers have directed their analytic attention to the role of the State’ actions in the noncompliance problem. Subsequently, given the increased prominence of non-State actors in global politics has challenged the leading International Relation-based compliance theories, which ultimately left Courts relatively under-treated in the research on the international system. Therefore, there has been significant attention in other, domestically-oriented literatures on compliance with judgments that highlight judicial decision-making, but similar attention

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<sup>10</sup> Diana Kapiszewski & Matthew M. Taylor, *Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings*, 38 LAW & SOCIAL INQUIRY, 822 (2013).

<sup>11</sup> Georg Vanberg, *Legislative-judicial relations: A game-theoretic approach to constitutional review*, AMERICAN JOURNAL OF POLITICAL SCIENCE, 349 (2001).

has seldom been paid in the international arena. The attention has been scarce, isolated and recent. This is especially true for the reality of international judgments in Latin America, which have not yet been the focus of systematic study.<sup>12</sup>

The literature on Court actions, over the last twenty years, has created a gap between the creation of authorities/Courts meant to counteract States' failures in complying with international judgments and the view, represented by IR-based compliance theories, of the Courts as cooperative normative institutions. This gap arises from underestimating the Court's role (participation) to influence noncompliance in their interaction with States either because of an exclusive focus on the powers of the State (realism and institutionalism), non-state actor (liberalism) or the System (constructivism) as in IR theories.

Compliance does not happen merely because we have international institutions, such as international Courts. International Courts exist because they perform valuable functions for States and States can modify their behavior in light of norms, although the extent to which they do so is contested. What is at issue is whether States modify their behavior in light of international Court judgments, rather than just norms. Courts can make a difference in compliance rates if their judgments create specific opportunities and impose meaningful constraints that affect State interest. In this process, do discourse and persuasion matter? Are calculations of interest and power all that really count? Or does the interaction between the two bring an added element into the equation?

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<sup>12</sup> Kapiszewski & Taylor, *LAW & SOCIAL INQUIRY*, 805 (2013). (Forms of compliance that are not always compatible with independent literatures) (As it was said domestically oriented literature has focused on compliance with judgments; there has to be something similar on the international plane. Thus, while one large body of work addresses compliance by civilians, public authorities (e.g., executives, legislatures, or bureaucracies), and subnational public authorities (e.g., lower federal or State Courts) with domestic laws and with the judgments of national Courts, the other addresses State compliance with international law and international Court judgments. In which the international Court judgments have not received systematic attention than deserve.)

The premise of this dissertation is that in order to understand or more fully describe compliance/noncompliance, one must explore State action and reaction to courts and their judgments. Therefore, this dissertation addresses one research question: *How do States move toward or away from compliance in their **interaction** with the Court and its judgments?*

This dissertation explores the question of noncompliance with ICHR judgments, by exploring the interaction between States and the Court through the dialogue mechanisms of the Court and States' routine or strategic responses, which related to each judgment and occurred during judicial proceedings and the monitoring process. These responses are analyzed independently and in interaction. This dissertation identifies emerging patterns in judgment noncompliance and uses them to ensure that practical considerations and reflections are ultimately the basis for empirically-based compliance theory. This foundation can also serve as the ground for sound statutory and political reform recommendations that aim to reduce or remove the underlying reasons of noncompliance.

My central conclusion is that the interaction between States and the Court is the causal mechanism for the judgment compliance since it affects the amount of compliance that States will be willing to supply. In the course of this interaction international institutions like the ICHR can affect international law and global politics/governance by providing legal, symbolic resources that translate into the power to name violations in particular intrusive law remedies. Nevertheless, political factors often limit the international Court and its nuanced, complex interaction with the State. This happens since the Court diminishes its potential influence on state behavior feeding the context for State strategies rather than leveraging the interaction in which these political factors are developed. The ICHR's participation in State strategies on compliance is demonstrated by describing how

these emerging patterns unfold in the cases in question. This participation is built around on an interesting, and somewhat counter-intuitive finding from the analysis of the ICHR case law—states parties that acquiesce in ICHR proceedings involving national high-level authorities have lower compliance rates with ICHR judgments than states parties that do not acquiesce. What is most impressive about my finding is that it revealed patterns that put in evidence that the reality of compliance problem does not always work the way the current governance (IR) theory says the reality does or should be.

The remainder of this dissertation proceeds as follows: Chapter 1, Part II discusses the concept of compliance. Section A defines and explains judgment compliance while Section B clarifies the current debate between compliance and effectiveness. Following by Section C that presents a brief discussion of what are international institutions. Part III sets out a brief narrative of the events leading to the creation of the ICHR, reviewing the historical, political and legal commonalities that support the States' empowerment of the ICHR with an enforcement role, despite the lack of support demonstrated through ICHR judgment noncompliance. Part IV describes the roles of the Courts. Part V reviews compliance theories, applied to the context of HR. This section presents four international relations theories -realism, institutionalism, liberalism, and constructivism- that offer competing but complementary assumptions to explain the conditions under which States comply with judgments, and the role of Courts in compliance. Chapter 2 provides an overview of the methodological process and a description of the coding scheme that guided this study. In this Chapter, the full process, which uncovered a surprising preliminary finding. This finding is that acquiescence leads to lower judgment compliance rates. Chapter 3, Part II shows the main quantitative results relating to (non)acquiescence and judgment (non)compliance. Part III discusses the qualitative analysis results, particularly as

they relate to patterns of behavior/actions concerned with the protection of high-ranking authorities. Following the coding system presented in Chapter 2, I divide the interaction between the States and the Court into five stages: signaling, exchange, negotiation, Monitoring, and sanctioning. Chapter 4, Part II offers illustrative cases that support the qualitative analysis with a set of narratives. It first points to the appearance of acquiescence in which key patterns from signaling, exchange and negotiation are illustrated and then proceeds to illustrate the shape of compliance in which key patterns from Monitoring and sanctioning are exhibited. Then, the Chapter turns in Part III to deviations from the fundamental patterns presented. Chapter 5 draws conclusions and offers prescriptions. Part I presents a detailed summary and discussing the results. Part II concerns the theoretical and policy implications of this dissertation. Part III introduces the limitations of this study and recommendations for further research.

## **II. CONCEPTUALIZING JUDGMENT-COMPLIANCE: TECHNICAL MEANING AND THEORETICAL ASPECTS**

### **A. Judgment compliance**

In a political context, judgment compliance involves at least two actors—a Court and the party burdened by its judgments (for this dissertation, the ICHR and States party to the Inter-American HR System, respectively). Compliance has a specific technical meaning for the purposes of this dissertation, operative with actions or inactions, through which States fully comply or fail to comply with, one or more Court-ordered reparation. However, compliance is not a dichotomous variable; most instances fall somewhere between the two absolute poles within a continuous variable lying between compliance and noncompliance:



partial compliance. Noncompliance is the opposite of following international rules (for this dissertation, the rules established by the Inter-American Convention<sup>13</sup>).

The concept of compliance, as considered by this dissertation, compares what is expected of the State (as stipulated in the judgment) with what the State does (effect of the judgment on State behavior). International judgments set the standard for compliance.<sup>14</sup> It poses the question: How can State behavior be managed toward compliance? I.e., what measures can be adopted to adjust State behavior to the international judgment expectation. Descriptive measurement is crucial for exploring and explaining actual compliance patterns.

IR theories explain compliance issues differently, which have common features (e.g. all posit that compliance affects the behavior of actors in the system), but also diverge in critical ways (e.g. compliance's effects on actors' behavior and whether intervention can alter the impact compliance has on such behavior). Still others have argued that relating the impact of norms is superfluous because international norms can affect State behavior even when States fail to comply.<sup>15</sup> Conversely, scholars have described compliance as conformity between an actor's behavior and a specified rule<sup>16</sup> and as internalization of international norms to avoid more than mere consequences.<sup>17</sup> This critical divergence has

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<sup>13</sup> POLITICAL RIGHTS, *AMERICAN CONVENTION ON HUMAN RIGHTS*. [www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights), reprinted in BASIC Documents. OAS/Ser. K/XVI/1.1., Document 65, Rev.1, Corr.1 of January 7, 1970, Nov. 22, 1969, O.A.S.T.S. No 36, 1144 U.N.T.S.123 (henceforth: the Convention or AC)

<sup>14</sup> Raustiala & Slaughter, *HANDBOOK OF INTERNATIONAL RELATIONS*, 538 (2002).

<sup>15</sup> Id. at, 539. Compliance "[a]s a concept, [...] is agnostic about causality [...] the impact of legal rules limited to compliance, legal rules may change State behavior even when States fail to compl[y...]"

<sup>16</sup> ROGER FISHER & ROBERT K GOLDMAN, *IMPROVING COMPLIANCE WITH INTERNATIONAL LAW* 20 (University Press of Virginia Charlottesville. 1981). Also see RONALD BRUCE MITCHELL, *INTENTIONAL OIL POLLUTION AT SEA: ENVIRONMENTAL POLICY AND TREATY COMPLIANCE* 30 (The MIT Press. 1994).

<sup>17</sup> Harold Hongju Koh, *Why do nations obey international law?* 106: 2598-2659 (2656-7) (JSTOR 1997). FRIEDRICH V KRATOCHWIL, *RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS* 36; 43 (Cambridge University Press. 1991). Koh and Kratochwil emphasized obedience as behavior resulting from the internalization of norms.

thwarted previous efforts to synthesize existing compliance works into a single coherent theory.

In contrast to the bulk of compliance literatures, which is focused on norms, and often on norms in theoretical abstraction, the present work is focused on judgments. Only an international Court, for the purpose of this dissertation “the ICHR” or “the Court,” as the institution that issues international judgments and defines compliance, has exclusive faculty of determining when a judgment has been wholly satisfied.<sup>18</sup> The Court has defined compliance, in the 2010 Annual Report, as a consequence of “[e]ffective implementation of the Court’s judgments” and its jurisdictional correlate, implementation, as “the effectiveness of the system.”<sup>19</sup> The next section addresses the debate about compliance and effectiveness.<sup>20</sup>

## **B. Case-Specific Effectiveness**

Scholars emphasize the difficulty in drawing a causal inference between compliance and effectiveness.<sup>21</sup> Compliance was driven out of institutional studies because it appeared to be, but was not, a confusing proxy for measuring causal effects.<sup>22</sup> The confusion arose because scholars examined different phenomena (judgment-compliance and primary norm

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<sup>18</sup> 2010 Annual Report, at 10, para. 3. As a State fulfills the duties emanating from multiple Court-ordered reparations, the Court declares full or partial compliance with the individual reparation, until the Court has closed the case, declaring full compliance with each of the reparations. Cases that remain open past the Court's initial deadlines are considered in noncompliance. Such cases are said to be in the stage of monitoring compliance (i.e. noncompliance or absence of compliance).

<sup>19</sup> *Id.*, supra note 5, at 9, par. 2

<sup>20</sup> Kal Raustiala, Compliance & (and) Effectiveness in International Regulatory Cooperation, 32 CASE W. RES. J. INT'L L., 387, 391-99 (2000). (defining distinct concepts of "compliance" and "effectiveness" and contrasting them with other concepts, such as "implementation"), at 392 ("Implementation refers to the process of putting international commitments into practice: the passage of domestic legislation, promulgation of regulations, creation of institutions (both domestic and international), and enforcement of rules.")

<sup>21</sup> Lisa Martin, “Against Compliance” in JEFFREY L DUNOFF & MARK A POLLACK, INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 591-2 (Cambridge University Press. 2012).

<sup>22</sup> *Id.* at.

compliance), dividing the literature among those defining compliance and effectiveness together and separately.<sup>23</sup>

Focusing on judgment-compliance, Laurence Helfer and Anne-Marie Slaughter liken compliance to Courts' effectiveness in garnering support from domestic politics/players that prompts their government to respect judgments.<sup>24</sup> Helfer acknowledges that, with this definition, international enforcement mechanisms are unavailable for most courts.<sup>25</sup> They assert that even if a State fails to comply with international Court's judgments (i.e. compliance is slow, partial or low), the judgments and Court remain effective if compliance costs come from the judgment's "meaningful constraints."<sup>26</sup>

Focusing on primary norm compliance (i.e. the international Court's ability to encourage compliance with underlying legal obligations), Kal Raustalia, detaching the concepts, asserts that compliance is conformity between behavior and a specified legal rule.<sup>27</sup> Effectiveness, on the other hand, is "observable, desired changes in behavior" attributable to that rule.<sup>28</sup> Since many international Court judgments mirror "pre-existing" State behaviors,<sup>29</sup> the value of immediate adherence, full or high compliance is discounted when evaluating courts' case-specific effectiveness because compliance can occur "for reasons entirely exogenous to the legal process."<sup>30</sup>

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<sup>23</sup> Laurence R Helfer, The effectiveness of international adjudicators, 468 (2014). Andrew T Guzman, International tribunals: a rational choice analysis, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 188 (2008). Yuval Shany, Assessing the Effectiveness of International Courts: A Goal-Based Approach, 106 THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 227, 244 (2012).

<sup>24</sup> Laurence R Helfer & Anne-Marie Slaughter, Toward a theory of effective supranational adjudication, 107 YALE LJ, 273, 290 (1997). Helfer, 469 (2014).

<sup>25</sup> Helfer, 467 (2014).

<sup>26</sup> Id. at.

<sup>27</sup> Raustalia, CASE W. RES. J. INT'L L., 393 (2000).

<sup>28</sup> Id. at, 387.

<sup>29</sup> Helfer, 467 (2014).

<sup>30</sup> Id. at, 469. Shany, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 227 (2012). Shany seems to follow similar logic to that presented by Raustalia regarding judicial remedies: "[A] low-aiming Court, issuing

Difficulty between compliance and effectiveness applies to norms. However, for Court judgments, “the real effectiveness test [...] is not compliance but the counterfactual of what the outcome would have been [in the] absence of the international Court.”<sup>31</sup> “Even if other factors may also have been important,”<sup>32</sup> it is reasonable to assume that a judgment materially altered a State’s behavior if, while operating under a judgment a State changes its behavior – towards or even away from compliance –the judgment materially influenced the change. Thus far, no one has satisfactorily demonstrated the influence of judgments in a way that answers “the counterfactual – would the State have done the same without the order”?<sup>33</sup> Even in the absence of this evidence, the claim that compliance is the measure of impact is invigorated to the core of institutional studies.

Posner and Yoo measure international adjudicatory effectiveness in terms of whether States comply with the Court’s decision.<sup>34</sup> Helfer and Slaughter say that compliance does not take into account the Court’s purpose exclusively, that compliance is not the same as effectiveness, and confusing the two only causes problems.<sup>35</sup> Helfer and Slaughter argue that Posner and Yoo omitted how political and discursive constraints provide insight into the relationship between effectiveness and broader explanatory factors.<sup>36</sup> The Court’s influence often depends upon States’ capacity, particularly through

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minimalist remedies, may generate a high level of compliance but have little impact on the State of the world.”

<sup>31</sup> Karen J. Alter, Agents or Trustees? International Courts in their Political Context, 14 *EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS*, 33, 52 (2008).

<sup>32</sup> Darren Hawkins & Wade Jacoby, Partial compliance: a comparison of the European and Inter-American Courts of Human Rights, 6 *J. INT’L L & INT’L REL.*, 39-40 (2010).

<sup>33</sup> Alexandra Huneeus, Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights, 44 *CORNELL INTERNATIONAL LAW JOURNAL*, 493, 505 (2011).

<sup>34</sup> Eric A. Posner & John C. Yoo, Judicial Independence in International Tribunals, 93 *CALIFORNIA LAW REVIEW* (2005).

<sup>35</sup> Laurence R Helfer & Anne-Marie Slaughter, Why States create international tribunals: a response to professors Posner and Yoo, see *id.* at, 11; 19-20

<sup>36</sup> *Id.* at, 30-1; 43; 47. Helfer and Slaughter argue that Posner and Yoo fail to account for the political climate of Court decisions, failing to consider informal limitations like rules. For instance, even

domestic politics, to carry out international judgments. As Simmons notes, compliance also relies on commitments and incentives. She asserts that when costs and benefits weigh in on a State's decisions to act, it is possible to determine which State actions were (or were not) influenced/incentivized by the Court's efforts to produce compliance.<sup>37</sup> Guzman clarifies that judgment compliance can be a factor in determining Court effectiveness.<sup>38</sup>

While it may be reasonable to assume that international Courts matter, in order to determine the purpose(s) for which international Courts are effective, more critical ex-ante assessment of the international Court's current roles and goals,<sup>39</sup> contextualized through an in situ exploration of the Court practicalities and its interactions with other actors, is required.

### **C. What are International Institutions?<sup>40</sup>**

The role of international organizations such as International Courts in international relations depends on how each of the leading IR theories interprets what the institutional system entails. Scholars in the IR literature they have provided vague definitions of

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independent Courts are limited in their real possibilities by politics and the attitudes of the surrounding legal authorities (i.e., legal discourse). In some instances, States can also communicate limits to a formally independent Court's scope of power because Court operates within a context where the interests of States are easily communicated. Thus, Helfer and Slaughter argue that independent Courts are constrained by State mechanisms (formal, structural and discursive) and pre-established rules of IL rather than exclusively political measures.

<sup>37</sup> Beth A. Simmons, Capacity, Commitment, and Compliance, 46 JOURNAL OF CONFLICT RESOLUTION, 843 (2002).

<sup>38</sup> Guzman, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 171, 187, 188 (2008). He emphasizes that "even when a State fails to comply with a tribunal's ruling, the tribunal may be effective at promoting compliance if it imposes sufficient costs on the State to discourage future violations of the underlying legal rule." Shany, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 244-5 (2012). Yuval Shany claims that encouraging primary norm compliance may present more descriptive and sizable challenges than judgment compliance.

<sup>39</sup> Shany, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 225 (2012). Dinah L Shelton, Form, function, and the powers of international courts, 9 CHICAGO JOURNAL OF INTERNATIONAL LAW, 12-3 (2009). See in the same vein: Karen J Alter, The multiple roles of international courts and tribunals: enforcement, dispute settlement, constitutional and administrative review, (2012) in DUNOFF & POLLACK, Interdisciplinary perspectives on international law and international relations: the state of the art (367). 2012.

<sup>40</sup> See in general to this section: John J Mearsheimer, *The false promise of international institutions*, 19 INTERNATIONAL SECURITY, 8-9 (1994).

international institutions. For example, definitions to satisfy every identified and regularized pattern of activity between states in which expectations converge. As a result of this absence of definition, an instrumental account emerges to define when and why institutions are created and permits a correct analysis. Mearsheimer's definition framed the concept of the institution. He produces a well-established conceptualization that has the merits to be compatible with the use of the notion between most institutionalist authorities.<sup>41</sup>

He describes institutions as a set of rules with five components. Set of rules is based in decentralized cooperation of individual sovereign states and competition with each other. This component of institutions is connected to discretionary state choice; however, Mearsheimer's definition has not considered (at least, explicitly) that for cooperating or competing —coincidence of interest, coordination, and coercion— are also necessary, as they can be the limits for institutions.<sup>42</sup>

The remaining components of Mearsheimer's definition are: Institutions are a set of rules that commands and impedes forms of state behavior. They are negotiated. Their negotiation assumes the mutual acceptance of standards of behavior defined regarding rights and duties. They are formalized in international agreements and consolidated into a formal international organization such as International Courts.<sup>43</sup>

To answer the question about how the interaction between States and Court do or do not work to produce compliance, we must examine the different IR theories separately. However, a brief discussion of the institutional system that is explored is in order first.

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<sup>41</sup> Id. at.

<sup>42</sup> Id. at.

<sup>43</sup> Id. at.

### III. THE STATES AND COURT IN THE CREATION OF THE ICHR SYSTEM

After WW II, hemispheric governments were concerned by the territorial integrity of the American nations. Accordingly, they approved a system of collective security to battle global aggression and conflict in the postwar by the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) signed in 1947 in Rio de Janeiro.

On April 30, 1948, by the Charter of the Organization of American States (OAS Charter in effect since December 1951) the Organization of American States, the oldest multilateral, regional organization in the world, was founded. OAS was founded by the US and twenty other States as a forum for issues of mutual concern<sup>44</sup> such as democracy, HR, security, and development. It currently comprises the thirty-five States of the Western Hemisphere.<sup>45</sup> In the same meeting (the Ninth International Conference of American States in Bogotá), American State members adopted the American Declaration of the Rights and Duties of Man, the world's first general human rights instrument. This declaration together the OAS Charter (OAS, April 30, 1948) and The Universal Declaration of HR (UDHR, Dec. 10, 1948) marked the beginning of the States' desire to create a HR regime and codify

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<sup>44</sup> GORDON MACE, et al., *GOVERNING THE AMERICAS: ASSESSING MULTILATERAL INSTITUTIONS* (Lynne Rienner Publishers. 2007). Since its creation, the OAS has been condemned to the eternal task of rolling a large stone to the top of a hill, which Gordon Mace and Jean-Philippe Thérien (2007) have described as a "Sisyphus" effect (see also Corrales and Feinberg 1999). Peter J Meyer, *Organization of American States: Background and Issues for Congress* (Congressional Research Service, Library of Congress 2014). id. at.

<sup>45</sup> OAS website, [www.oas.org](http://www.oas.org). OAS members States. BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTERAMERICAN SYSTEM, OEA/Ser. LV/1.82, doc. 6 (discussing the member states of the OAS), at 53. There are thirty-five member states of the OAS. They are Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay, and Venezuela. See Inter-American Commission on Human Rights.

rules that gradually protect individuals from their own governments.<sup>46</sup> The OAS member states inspired in the HR protection, primarily seated in the Inter-American HR System, is placed under surveillance of the OAS.

The US has sought to use the OAS to advance economic and security objectives in the Western Hemisphere and to fight communism.<sup>47</sup> The US objectives were jeopardized by systematic assassinations, disappearances, torture, detentions and other harassments backed by top-down authorities of authoritarian regimes. Even worse, when heads of State seem willing – as later happened — to sponsor strategic alliances of security and intelligence to commit massive trans-frontier violations of HR and preserve impunity for those implicated.<sup>48</sup> Amidst the rise of authoritarian regimes in the Americas on the 1950s, the idea of the HR regime started to be forged, according to Jack Donnelly, because of

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<sup>46</sup> CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* 8 (Oxford University Press. 2008). As Tomuschat noted, the UDHR was the beginning of the States desire for the creation of such a regime that would protect individuals from their own governments. See Annemarie Devereux, *Australia and the International Scrutiny of Civil and Political Rights: An Analysis of Australia's Negotiating Policies, 1946-1966*, 22 *AUST. YBIL*, (55;57;58;60;62;64;79) (2002). In no case did the States perceive the devastation of WWII as a complete legal crisis for HR; therefore, the Holocaust was not perceived as invalidating an existing HR rule or regime and thus States fail to expose the need for more robust enforcement. E.g. creation of an international HR Court with universal jurisdiction since also powerful States can block the creation of institutions. In fact, Australia's 1948 proposal for creation of such a Court failed due to opposition by two powerful States—the UK and the US. By the late 1940s, the US had begun to hedge on constructing “a new world order.” Power calculations explain the collateral intervention of the US and China. Devereux writes that a universal HR Court “never came close enjoying the support of the majority.” HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 447 (Houghton Mifflin Harcourt. 1973). Thus, Arendt affirmed that at the end of WWII, HRs were in need of new norms because HR discourse itself was contributed to the atrocities of the twenty centuries because it is the powerless who are exposed to abuses and HR had become unenforceable. She writes, “the rights of man, which has never been philosophically established but merely formulated which had never been politically secured but merely proclaimed, have, in their, traditional form, lost all validity.”

<sup>47</sup> Noam Chomsky, *The umbrella of US Power*, *THE UNIVERSAL DECLARATION*, 10 (1999). According to Chomsky, Lars Schoultz and Edward Herman found that the US has tended to flow disproportionately to Latin American governments sacrificing HR. The first, “which torture their citizens... to the hemisphere's relatively egregious violators of fundamental HR,” and the second, that aid is correlated with improvement in the investment climate. See details in LARS SCHOULTZ, *HUMAN RIGHTS AND UNITED STATES POLICY TOWARD LATIN AMERICA* (Princeton University Press. 2014).

<sup>48</sup> *Goiburú v. Paraguay (Merits, Reparations and Costs)* ICHR, 22 September 2006, Ser. C No. 153, paras. 84 and 89.



dominant power; the US wielded its hegemonic power in support of the Inter-American HR system's creation and operation.<sup>49</sup>

OAS members created the Inter-American Commission on Human Rights (the Commission) in 1959. The Commission is the first autonomous agency of the inter-American HR system whose mandate stems from the OAS Charter. The Commission's function is to promote the observance and defense of HR in the Americas. In particular, this agency monitors and reports on the general HR situation in the member states. It also provides a venue for the denunciation and resolution of HR violations in individual cases, as a quasi-judicial body.

Later, the American Convention was adopted at the Inter-American Specialized Conference on HR held November 7-22, 1969 in San Jose, Costa Rica. This Convention came into effect on July 18, 1978, when the eleventh instrument of ratification by an OAS member State was submitted.<sup>50</sup> As to date, the US has not ratified the Convention,<sup>51</sup> despite the fact that US participates in the Inter-American HR System.<sup>52</sup> The annual reports of the OAS and ICHR show that, as of 2014, the US provides 41% of the OAS budget<sup>53</sup> and the

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<sup>49</sup> Jack Donnelly, *International human rights: a regime analysis*, 40 INTERNATIONAL ORGANIZATION, 625, also 637-8 (1986).

<sup>50</sup> *Id.*, at 49

<sup>51</sup> The States that have not yet ratified the Convention are Antigua & Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts & Nevis, St. Lucia, St. Vicente & Grenadines, and the U.S. The States that have denounced the Convention are Trinidad & Tobago, Peru and Venezuela on May 26, 1998; July 08, 1999; and September 10, 2012, respectively. Peru's denouncement of the Convention was reverse on January 29, 2001.

<sup>52</sup> Tom J Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, 19 HUMAN RIGHTS QUARTERLY, 520-1 (1997). KATHRYN SIKKINK, *MIXED SIGNALS: US HUMAN RIGHTS POLICY AND LATIN AMERICA* (Cornell University Press. 2007).

<sup>53</sup> OAS, 4th Quarterly Resource Management and Performance Report, January 1 to December 31, 2013, February 20, 2014. The OAS budget is expected to total \$167 million in 2014. The US is the top source of funding for the OAS. It contributed at least \$65.7 million in FY2013—equivalent to 41% of the total 2013 OAS budget. In 2013, the largest member State donors after the US were Canada (\$22.6 million), Brazil (\$8.7 million), Mexico (\$7.9 million), Colombia (\$3.5 million), and Argentina (\$2.6 million).

OAS provided 40,9% of the ICHR's 2014 income.<sup>54</sup> However, politically, States that have not ratified have less credibility to encourage other States to follow the norms HR decisions in the regime.<sup>55</sup>

This HR regime (as many other regimes) did not impose very many explicit and specific duties regarding compliance and inter-State action does not enforce them.<sup>56</sup> Indeed, when regimes seem to empower governments to challenge one another, as it can be illustrated through the Inter-American HR regime,<sup>57</sup> such challenges are a rarity.<sup>58</sup> When they do occur, as in the Inter-State cases (Nicaragua v. Costa Rica<sup>59</sup> and Ecuador v. Colombia),<sup>60</sup> they are short-lived.<sup>61</sup> Reason to argue that States perceive HR as peripheral due to the intangibility of HR that addresses issues like dignity.<sup>62</sup> HR do not “involve substantial reciprocity, which weakens possibilities of mutually beneficial self-executing

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<sup>54</sup> See 2014 Annual Report, at 77. According to “Program— Budget of the Organization,” approved by the General Assembly during the forty-third special session, November 2013, AG/RES.1 (XLIII-E/12), available at <http://www.oea.org/presupuesto/>. Thus, the Court's budget for 2014 was 1.59% of the OAS budget (US\$2.661.000,00), approved by the General Assembly.

<sup>55</sup> Robert K. Goldman, History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights, 31 HUMAN RIGHTS QUARTERLY, 856, 887 (2009).

<sup>56</sup> Andrew Moravcsik, *The origins of human rights regimes: Democratic delegation in postwar Europe*, 54 INTERNATIONAL ORGANIZATION, 217 (2000).

<sup>57</sup> This System is represented by the OAS Declaration of the Rights and Duties of Man, American Convention and OAS Charters. Id., supra 11, American Convention, Article 45 stipulated that right.

<sup>58</sup> Jo M. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights* 116 (Cambridge University Press Second Edition. ed. 2013).

<sup>59</sup> IACHR, Inter-State Case 01/06 Nicaragua v. Costa Rica Report No 11/07 (2007)

<sup>60</sup> IACHR, Inter-State Petition IP-02, Admissibility, Franklin Guillermo Aisalla Molina (Ecuador v. Colombia) Report No. 112/10 (Oct, 21m 2010)

<sup>61</sup> Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*. 2013. Farer, HUMAN RIGHTS QUARTERLY, 31, 36 (1997). “As Farer anticipated, to date no interstate case has yet reached the ICHR.”

<sup>62</sup> ARENDT, *The origins of totalitarianism* 447. 1973. As Arendt insists-4kmk4k that “the rights of man, which has never been philosophically established but merely formulated which had never been politically secured but merely proclaimed, have, in their, traditional form, lost all validity.” They are powerless phantoms unintentionally exposed to abuse. Likewise, their vapidty or intangible nature is evidenced by Hathaway, THE YALE LAW JOURNAL, (2002). When she says that since a nation's actions against its own citizens do not directly threaten other States, “the costs of retaliatory noncompliance are low and don't independently affect State power calculations.”

agreements.”<sup>63</sup> In consequence, “international HR treaties cannot be understood as mechanisms of cooperation for mutual benefits of all parties.”<sup>64</sup>

The OAS member states put in consideration the possibility that a Regional HR Court may be apt to mediate the tension between the oppressor State (whose policies, practices and abstentions are detrimental to human dignity) and the protector State (which theoretically promotes the interest and well-being of its citizens).<sup>65</sup> Thus, instead of disciplining inter-State public relations or structuring domestic HR climates, an international or regional HR Court judgment is almost entirely applied within State borders and is most often used to inspire State strategies and policies.<sup>66</sup> Since domestic law tends to “reflect deeply held national values,” these judgments are often met with high resistance.<sup>67</sup> It is, therefore, not surprising that States often do not comply with international HR judgments.

The question then becomes: why do States create international or regional HR Courts to adjudicate and enforce HR?<sup>68</sup>

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<sup>63</sup> Beth Simmons, *Treaty compliance and violation*, 13 ANNUAL REVIEW OF POLITICAL SCIENCE, 288 (2010).

<sup>64</sup> Eric Neumayer, *Do international human rights treaties improve respect for human rights?*, 49 JOURNAL OF CONFLICT RESOLUTION, 927 (2005).

<sup>65</sup> TOMUSCHAT, Human rights: between idealism and realism 8. 2008. Moravcsik, INTERNATIONAL ORGANIZATION, (2000). Hathaway, THE YALE LAW JOURNAL, (2002). Oona A Hathaway, Why do countries commit to human rights treaties?, 51 JOURNAL OF CONFLICT RESOLUTION (2007). Neumayer, JOURNAL OF CONFLICT RESOLUTION, (2005). Simmons, ANNUAL REVIEW OF POLITICAL SCIENCE, (2010).

<sup>66</sup> Moravcsik, INTERNATIONAL ORGANIZATION, 217 (2000).

<sup>67</sup> Helfer, 469 (2014).

<sup>68</sup> Moravcsik, INTERNATIONAL ORGANIZATION, 217 (2000). Similarly, he asks “why governments construct international regimes to adjudicate and enforce HR.” States enhance the credibility of domestic policies and consolidate democratic institutions (vis-à-vis non-democratic political threats) by delegating authority to international and independent institutions. Moravcsik cites this as the States’ rational motivation for engaging in international processes of cooperation and integration despite the associated loss of sovereignty. Terry M Moe, Political institutions: The neglected side of the story, JOURNAL OF LAW, ECONOMICS, & ORGANIZATION, 227-8 (1990). As Moe explains, HR norms are democratic governments’ expressions of interest in “locking in” democratic rule through the enforcement of HR, which are used to insulate and constrain the actions of future governments.

In 1979, OAS Member States created a regional Court for the protection of HR, the Inter-American Court of Human Rights (ICHR). This Court is produced among the 82 articles' American Convention that established more than 24 rights. The norms that outline the structure, function and authority of the Court are part of the American Convention, the Court's 1979 Statutes<sup>69</sup> and its Seven Rules of Procedure since 1980 to 2009.<sup>70</sup> The Court is settled in San Jose, Costa Rica, and it is made up of seven judges elected in their personal capacity who are from the OAS Member States. The Court is created for the purpose of judicial interpretation and application of the Convention and other inter-American HR treaties, in particular for the issuance of judgment on cases for HR abuses and consultative opinions.

This case (of Court creation) is not so much a contest between the US and Latin American and Caribbean States as part of a broader battle over the direction of ICHR life in the coming years. At the center of this struggle is the concept of Court authority (conceptualized at various times or actors as competence, power, jurisdiction, etc.)— it is not a particularly new idea, but one that has gained considerable momentum lately. Since the basic instruments of the OAS did not reflect the Caribbean reality or interests, adherence to the ICHR was “slower and halting.”<sup>71</sup> Moreover, with the US poised to use

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<sup>69</sup> Organization of American States (OAS), Statute of the Inter-American Court of Human Rights, 1 October 1979.

<sup>70</sup> Rules of Procedure of The Inter-American Court of HR, January 1, 2010 was approved by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28, 2009. [hereafter Rules of Procedure] [These Rules of Procedure entered into force on January 1, 2010]. The previous Rules of Procedure were 1980, 1991, 1996, 2000 and 2003.

<sup>71</sup> Laurence R Helfer, Overlegalizing human rights: International relations theory and the commonwealth Caribbean backlash against human rights regimes, 102 COLUMBIA LAW REVIEW, 1864 (2002).

the Court to support its public foreign policy HR agenda,<sup>72</sup> Caribbean and Latin American States were weary that judges could be beholden to State governments.<sup>73</sup>

Drafters of the Convention appealed that, "the problems of our hemisphere are more unique to the American than they are universal or European. They can only be solved within the framework of our own legal, cultural, political, and social traditions,"<sup>74</sup> detaching from UN and European HR instruments,<sup>75</sup> indeed, OAS Member States designed an independent Court<sup>76</sup> that can assume a wide array of roles as an autonomous, impartial and neutral arbiter, mediator, investigator and judge;<sup>77</sup> however, recognition of its competence is voluntary.<sup>78</sup> This means cases can only be brought against States that have ratified the American Convention and have previously recognized the competence of the Court,<sup>79</sup> unless a State accepts jurisdiction expressly for a specific case. At least in theory,

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<sup>72</sup> SIKKINK, *Mixed signals: US human rights policy and Latin America*. 2007.

<sup>73</sup> Posner & Yoo, *CALIFORNIA LAW REVIEW*, 12-35 (2005). Posner and Yoo show that Courts with judges beholden to State governments are used more, have higher rates of compliance and are likely to be more effective than preachy, independent Courts. They point to the 5% of ICHR judgments that were met with full compliance – a figure that is debatably misleading without deeper comparative analysis of partial compliance and noncompliance. They also argue that because States have no way of ensuring that the judges will be faithful to the State preferences set forth in a treaty, customary IL, or arbitration, States prefer tribunals that are dependent on the interests of the States they serve.

<sup>74</sup> Thomas Buergenthal, *American and European Conventions on Human Rights: Similarities and Differences*, *The*, 30 *AM. UL REV.*, 155-6 (1980).

<sup>75</sup> Council of Europe, report on the Inter-American Specialized Conference on HR (Strasbourg, 22 December 1969), reprinted in THOMAS BUERGENTHAL & ROBERT E NORRIS, *HUMAN RIGHTS, THE INTER-AMERICAN SYSTEM* § 4 (Oceana Publications. 1986).

<sup>76</sup> Helfer & Slaughter, *CALIFORNIA LAW REVIEW*, (2005). Helfer and Slaughter note that States are recognizing the importance of independent Courts and tribunals. This is evident in the rising number of States ratifying treaties that establish independent international Courts (as opposed to arbitration) for disputes and submitting to the Court's jurisdiction, even when it is optional. More significant that creation is that these Courts are used more often, at least contrary to Posner and Yoo (see *supra* footnote 53). Helfer and Slaughter point to statistics indicating that over 80% (14,946 of 18,277) cases have been heard by international tribunals in the last 13 years (as of 2005). Even if this figure is controlled for the number of States that have ratified the Courts and the number of years that the Court has been operation, caseload is only one way to measure of the increased use of international Courts and tribunals.

<sup>77</sup> Thomas Legler, *The Organization of American States and Effective Multilateralism*, *ROUTLEDGE HANDBOOK OF LATIN AMERICA IN THE WORLD*, 313 (2014).

<sup>78</sup> *Id.*, *supra* 11, American Convention, Art. 62.1

<sup>79</sup> *Id.*, Article 62.2

there is complete freedom for OAS Members to ratify the American Convention, to recognize or to reject the competence/optional jurisdiction of the Court.<sup>80</sup>

The Convention-mandated procedures empower the Court to ensure State compliance with the rights set forth in the instrument<sup>81</sup> and in the Charter of the OAS.<sup>82</sup> The Court is responsible for monitoring this implementation by States parties. To do so, the Court is granted with the adjudicatory function. This function is the mechanism by which the Court determines if a State has incurred in international responsibility for having violated any of the rights stipulated in the Convention or other applicable HR treaties. The ICHR's judgments describe the meaning and extent of the HR, State obligations, and procedural and probatory regulations. The States Parties to the Convention, who have accepted the Court's jurisdiction and the Commission (when its recommendations about the international responsibility of the States for HR violations have not been complied) have the right to submit a case to the Court, pursuant with Article 61(1) of the Convention. Individuals such as Victims and Representatives, groups of individuals, or organizations that allege violations of the HR do not have direct recourse to the ICHR; they must first submit their petition to the Commission and go through the procedure for cases before the Commission.

For thirty two years, this watchdog's bark (ICHR) was much "bigger than its bite" since it was sometimes "unwilling and often unable to stop widespread HR abuse in the

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<sup>80</sup> Id., Article 62.3. Twenty-one of the States Parties of the American Convention, including all Latin American States, have accepted the compulsory jurisdiction of the Court. These States are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. The only three States Parties to the American Convention that have not accepted jurisdiction of the ICHR are Dominica, Granada and Jamaica.

<sup>81</sup> Id., supra 11, American Convention, Article 33

<sup>82</sup> Charter of the Organization of American States (American Charter), April 30, 1948, 2 U.S.T. 2394, U.N.T.S. 48.

region.”<sup>83</sup> Some suggest that since 1965 the Commission’s authority to examine specific human cases of HR violations,<sup>84</sup> which it always does before the Court hears a case, has prevented/delayed the Court from taking more assertive action.<sup>85</sup> Since 2002, the Commission has reviewed more than 10,234 petitions,<sup>86</sup> while the Court has only received 154.<sup>87</sup>

The Court ruled its first case inadmissible in the Viviana Gallardo Costa Rica (case) on 1983, but only until 1988 in the Velasquez-Rodriguez (Honduras) case the Court ruled a judgment on merits.<sup>88</sup> The Court issues judgments on merits but also on reparations and costs and monitoring judgments. Seventy percent of the Court cases include claims of extrajudicial execution, torture, illegal detainment, deprivation of liberty and unfair trial and sentencing.<sup>89</sup> The Court is also responsible for monitoring the implementation of its judgments by states parties. The Court’s judgments may include multiple Court-ordered reparations, in consequence, determining whether a State has complied with judgment is a faculty exclusively belonging to the Court. As a State fulfills the duties emanating from

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<sup>83</sup> Courtney Hillebrecht, *The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter- American Human Rights System*, 34 HUMAN RIGHTS QUARTERLY, 960 (2012).

<sup>84</sup> [www.oas.org/en/lachr/annual/2013/docs-en/AnnualReport-Introduction.pdf](http://www.oas.org/en/lachr/annual/2013/docs-en/AnnualReport-Introduction.pdf)

<sup>85</sup> Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights* 6. 2013. “The Commission did not forward contentious cases to the Court until 1986, seven years after the Court’s inception.” Farer, HUMAN RIGHTS QUARTERLY, 544 (1997). “The Commission’s seeming indifference to the Court, even reluctance to send it business [...] once the Court appeared on the scene, more than one Commission member saw a danger that States might attempt to delay Commission action and undermine its prestige [...]” PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS* 1003 (Oxford University Press. 2013). (“Initially the Court and the Commission saw each other as rivals. The Commission, established over two decades earlier, was very reluctant to refer contentious cases to the Court [...]”)

<sup>86</sup> [www.oas.org/en/lachr/annual/2013/docs-en/AnnualReport-Chap2A-B.pdf](http://www.oas.org/en/lachr/annual/2013/docs-en/AnnualReport-Chap2A-B.pdf) at 45

<sup>87</sup> [www.oas.org/en/lachr/annual/2013/docs-en/AnnualReport-Chap2A-B.pdf](http://www.oas.org/en/lachr/annual/2013/docs-en/AnnualReport-Chap2A-B.pdf) at 54

<sup>88</sup> *The Velasquez-Rodriguez v. Honduras (Merits)* ICHR, 29 July 1988, Ser. C No 4 that was included in 1988 Annual Report and the *Viviana Gallardo et. al v. Costa Rica* by Order dated September 8, 1983 as recorded in the 1984 Annual Report at 41.

<sup>89</sup> Percentage calculated based on the database created for this dissertation. I extracted the type of violation from the operative paragraphs of Inter-American Court Judgments on merits. More details available in Chapter III, Results.

these reparations, the Court declares when States have full compliance with individual reparations and closes the case by stating full compliance with all the reparations. Cases that remain open past the Court's initial deadlines to comply are considered in noncompliance, as it was mentioned above. Such cases are said to be "on the stage of monitoring compliance with Judgments."<sup>90</sup> This phase of follow-up compliance with Judgments is called "the monitoring process."

On 1999, the Court clarifies that as an organ with jurisdictional functions, it has the authority inherent to determine the scope of its jurisdiction (i.e., *compétence de la compétence/Kompetenz-Kompetenz*).<sup>91</sup> On 2002, the Court was accused of "unilaterally extending its jurisdictional function to create a monitoring function."<sup>92</sup> The Court was also accused of "interprets its own judgment," constituting a 'post-judgment stage' [...]; [which] did not fall within the judicial sphere of the Court, but strictly within the political sphere of the General Assembly of the OAS (GA)."<sup>93</sup> On November 28, 2003, through its first Judgment on Competence, the Court "rejects as inadmissible the State's questioning of the competence of the Court to monitor compliance with its judgments"<sup>94</sup> because its authority to monitor judgments was rooted in promoting "effectiveness of decisions on reparations."<sup>95</sup> Likewise, the Court clarified its "inherent and non-discretionary"<sup>96</sup> competence to monitor compliance to reporting noncompliance to the GA. In the same

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<sup>90</sup> 2010 Annual Report, at 10, para. 3

<sup>91</sup> Advisory Opinion OC-21/14, 19 August 2014, Ser. A No.21, Requested by The Argentine Republic, The Federative Republic of Brazil, The Republic of Paraguay and The Oriental Republic of Uruguay, para. 17.

<sup>92</sup> Baena-Ricardo et al. v. Panama (Competence) ICHR, 28 November 2003, Ser. C No 104, c); operative para. 214. 6)

<sup>93</sup> Id, paras. 26 and 41. The state asserts that, according to Article 65 of the Convention; only the General Assembly had that authority

<sup>94</sup> Id., paras 3 and 4

<sup>95</sup> Id., paras. 23 and 72

<sup>96</sup> Id., para. 44



way, the Court also explained its competence to require States that have been found internationally responsible for reporting periodically on compliance<sup>97</sup> pursuant various precepts. Such as Article of the Convention,<sup>98</sup> the Statutes of the Court,<sup>99</sup> and the Vienna Convention on the Law of Treaties.<sup>100</sup>

The Court also considers that as the “ultimate interpreter of the Convention” it is competent to issue interpretations of all its provisions, even those of a procedural nature, with full authority.<sup>101</sup> On 2009, the Court unanimously approved the legal grounds for the ICHR’s competence to monitor compliance with its judgments via in Article 69 of the Rules of Procedure.<sup>102</sup> The Court considers that its faculty to create rules also stays explicit in the exercise of its advisory function which presupposes the acceptance of the Court’s right to decide on the scope of its jurisdiction.<sup>103</sup> Article 64(1) of the Convention granted the Court competence to resolve request of advisory opinion on the interpretation of the Convention or other treaties concerning the protection of HR in the States of the Americas.<sup>104</sup> This function is “a service” by which the Court provides to all the members of the inter-American HR system”<sup>105</sup> interpretations and clarifications about the meaning and

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<sup>97</sup> Id., paras. 131 and 133

<sup>98</sup> Id., supra 11, American Convention, Articles 33, 62 (1) and (3) and Article 65

<sup>99</sup> Id., supra 62

<sup>100</sup> The Vienna Convention on the Law of Treaties, Article 31.1, May 23, 1969, Vienna, [entered into force on January 27, 1980] U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331 (Under this provision, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”)

<sup>101</sup> Id., supra 11, American Convention, Article 55. Advisory Opinion OC-20/09, 29 September 2009, Ser. A No.20, para. 18, and Chaparro Álvarez and Lapo Íñiguez v. Ecuador (Preliminary Objection, Merits, Reparations, and Costs), ICHR, 21 November 2007, Ser. C No. 170, para. 15

<sup>102</sup> Rules of Procedure, Article 69 (The attributions are listed in the Rules of Procedure of the Inter-American Court)

<sup>103</sup> The Constitutional Court v. Peru (Competence), ICHR, 24 September 1999, Ser. C No. 55, para. 33

<sup>104</sup> Id., supra 75

<sup>105</sup> Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87, 6 October 1987, Ser. A No. 9, para. 16, and American Convention, Article 55 of the American Convention on Human Rights, supra 11. para. 15. “Other Treaties” Subject to the Advisory Jurisdiction of the Court (American Convention, Article 64), supra 11, para. 39, and

purpose of international HR law provisions. (See further details about the Court's functions in the proceedings and monitoring processes in a map of action-process in Appendix C.)

Indeed, the Court has no formal and effective mechanism to enforce its judgments.<sup>106</sup> The Convention provides only that the Court shall present its annual report to the OAS General Assembly.<sup>107</sup> When the Court submits recommendations to the General Assembly pertaining to the cases in which States are in noncompliance,<sup>108</sup> the General Assembly is empowered to discuss the case and adopt political measures against the State. Yet, political pressure to comply with the Court judgments has not materialized, as the General Assembly has not pronounced on any of the Court's noncompliance reports.<sup>109</sup> The Court's Annual Report is not included in General Assembly's agenda. The Permanent Council -the political body made up of OAS ambassadors- receives the report and controls the General Assembly's agenda, impeding political debate.<sup>110</sup> As Cavallaro noted, the Court's requirements are not at all echoed by the OAS. It is reasonable to say, "the Court

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Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights (American Convention, Articles 41 and 44 to 51), *supra* 11, para. 18.

<sup>106</sup> Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights* 7, 28. 2013.

<sup>107</sup> *Id.* at American Convention., Art. 65

<sup>108</sup> *Id.*, Statute Art. 30.

<sup>109</sup> For instance, the ICHR's calls to the General Assembly regarding the following cases remain unanswered: *Suarez Rosero v. Ecuador*, *Loayza Tamayo v. Perú*, *Castillo Petruzzi v. Perú*, *Villagrán Morales v. Guatemala*, *Paniagua Morales et al. v. Guatemala*, *Yean and Bosico Girls et al. v. Dominican Republic*, and is last but arguably most important case, *Trinidad and Tobago's James et al. case*. See Annual Report 1998, at 40, par. 7, that the Court clearly States: "[...] n accordance with Article 65 of the American Convention, [it] inform[ed] the General Assembly of the Organization of American States that the Republic of Trinidad and Tobago, State party to the American Convention on HR, ha [d] not [upheld] the provisional measures adopted in the James et al. Case. As a result, it request[ed] that the General Assembly urge the Republic of Trinidad and Tobago to comply with the orders of the Court." The OAS' General Assembly ignored the Court's demand that Trinidad and Tobago be forced into compliance. The petition was made in light of the State's disobedience, when on June 4, 1999 Trinidad and Tobago executed Joey Ramiah in disregard for the Court's provisional measure requesting the preservation of his life and physical integrity. Even though he was executed two days before the last meeting of the OAS General Assembly, the issue was not included on the agenda

<sup>110</sup> Farer, *HUMAN RIGHTS QUARTERLY*, (1997). The political organs of the OAS have maintained a hands-off approach with the HR instruments.

lacks strong political backing from the OAS.”<sup>111</sup> Without such support, the ICHR lacks the power to enforce compliance.

The OAS General Assembly has not assumed an active role in censure of States by applying costly political sanctions that would allow a positive influence on State compliance.<sup>112</sup> As the European system’s observer to the American drafting conference expected, most governments [would prefer] to avoid the procedure of reporting noncompliance to the General Assembly because it is attended by several hundred delegates and widely publicized.<sup>113</sup> The drafters of the Convention lacked the foresight to grant the General Assembly the right to adopt political measures against the State's in the event of noncompliance. Even if such rights were granted, they remained inhibited in light of the US embargo against Cuba<sup>114</sup> and US military interventions (Guatemala, Dominican Republic, Granada, and Panama), which violated the sovereignty provisions of the OAS Charter.<sup>115</sup> OAS members States, even when they seem concerned about HR violations, are inhibited themselves from taking (or pressuring) a political decision/sanction against another State. They are inhibited for fear the region’s larger countries would use the OAS

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<sup>111</sup> James L Cavallaro & Stephanie Erin Brewer, Reevaluating regional human rights litigation in the twenty-first century: The case of the Inter-American Court, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, 784 (2008).

<sup>112</sup> Héctor Faúndez Ledesma, *El sistema interamericano de protección de los derechos humanos: aspectos institucionales y procesales*, SAN JOSÉ: INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS (1996). Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights* 29. 2013.

<sup>113</sup> Council of Europe, Report on the Inter-American Specialized Conference on HR (Strasbourg, 22 December 1969), reprinted in *BUERGENTHAL & NORRIS, Human Rights, the Inter-American System*. 1986.

<sup>114</sup> Arthur Schlesinger explained that embargo, in place since 1961, was the result of the Kennedy administration’s fears that the spread of the Castro ideology would destabilize Latin America, as Cuba established itself as an example of revolution, decent life and connection to the Soviet Union. *Foreign Relations of US, 1961-63*, vol. xii, American Republics, 13f., 33

<sup>115</sup> Legler, *ROUTLEDGE HANDBOOK OF LATIN AMERICA IN THE WORLD*, 319 (2014).

General Assembly to intervene (with economic sanctions or military forces) in the smaller ones, of jeopardizing its economic interests, or of having its own practices evaluated.<sup>116</sup>

Despite limits of the sorts cited herein, through their various roles, International Courts started to carry out their roles in international politics, surpassing low expectations of achievements.<sup>117</sup> HR became a part of international politics because its discourse and rhetoric are related to stability and State security,<sup>118</sup> coordination with other areas of interest<sup>119</sup> (e.g., trade, environmental issues, international development assistance and diplomacy) and maintenance of domestic political support and domestic and international legitimacy.<sup>120</sup> Thus, today, Courts represent potentially powerful players able to reshape IR, mainly if one considers the effect of the Courts' judgments.<sup>121</sup>

#### **IV. THE ROLES OF INTERNATIONAL COURTS**

International Courts have four State-delegated roles defined on the bases of mandates: dispute resolution, constitutional review, administrative review, and enforcement.<sup>122</sup> The dispute resolution role, in which international Courts assist States in

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<sup>116</sup> Farer, *HUMAN RIGHTS QUARTERLY*, (1997). Member States rarely speak out to promote compliance with the tribunals' rulings in other States in fear of retribution.

<sup>117</sup> *Id.* at, 514; 544.

<sup>118</sup> COURTNEY HILLEBRECHT, *DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE* § 104 (Cambridge University Press. 2014); Courtney Hillebrecht, *Unpacking Political Will: Domestic Politics and Compliance with Human Rights Tribunals*.

<sup>119</sup> HILLEBRECHT, *Domestic politics and international human rights tribunals: the problem of compliance*. 2014.

<sup>120</sup> Courtney Hillebrecht, *Domestic Politics, International Human Rights Adjudication, and the Problem of Political Will: Cases from the Inter-American Human Rights System*, *CONFERENCE PAPERS -- MIDWESTERN POLITICAL SCIENCE ASSOCIATION*, 984-5 (2009).

<sup>121</sup> Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*. 2013.

<sup>122</sup> Karen J Alter, *The multiple roles of international courts and tribunals: enforcement, dispute settlement, constitutional and administrative review*, (2012) in DUNOFF & POLLACK, *Interdisciplinary perspectives on international law and international relations: the state of the art* (345-70). 2012.

settling their disputes, is the most characteristic. This role is an opportunity to issue orders for problem solving, facing contentious States, petitions or justifications.<sup>123</sup>

Through its constitutional review role, the Court assesses the legal validity of legislative and government actions based on a conflict with higher order legal obligations.<sup>124</sup> In IL, these higher order laws are the founding treaties that *constitute* supranational political systems and they may also include basic rights protections of member States.<sup>125</sup> Constitutional review of State international acts enables the international Court to nullify illegal international acts, but not to invalidate “illegal” national acts.<sup>126</sup> Scholars draw equivalencies between enforcement of international HR agreements and the capacity to perform constitutional review of State acts or elevating international trade agreements to a form of higher order law with precedence over conflicting national laws and policies.

When a stakeholder contests a decision made by an administrative player, some international courts perform administrative reviews, in which they ensure that the decision upholds the law and prescribed procedures and is legally defensible. In practice, it is often perceived as encroachment on prerogatives. Thus, the international Courts often use the

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<sup>123</sup> Id. at, (354). As Alter recognizes, HR bodies do not include dispute settlement provisions.

<sup>124</sup> ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE: CONSTITUTIONAL POLITICS IN EUROPE* 21 (Oxford University Press. 2000). See in DUNOFF & POLLACK, *Interdisciplinary perspectives on international law and international relations: the state of the art*. 2012.

<sup>125</sup> JEFFREY L DUNOFF & JOEL P TRACHTMAN, *RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* (Cambridge University Press. 2009). See in DUNOFF & POLLACK, *Interdisciplinary perspectives on international law and international relations: the state of the art*. 2012.

<sup>126</sup> Karen J Alter, *The multiple roles of international courts and tribunals: enforcement, dispute settlement, constitutional and administrative review*, (2012) in DUNOFF & POLLACK, *Interdisciplinary perspectives on international law and international relations: the state of the art* (353). 2012.

administrative review function to support the State, reaffirming its decisions against complaints.<sup>127</sup>

In its last but arguably most important role, enforcement, the international Court monitors State compliance with international rules and assigns consequences for noncompliance. In this role, international Courts do more than monitor compliance with norms. Some monitor judgment compliance according to their mandates, observing and checking the States' progress toward reparations ordered. Even though there is no international government apparatus through which the international Court can enforce these judgments, the hope is that the Court's authority encourages compliance.<sup>128</sup> Monitoring, which draws power from the latent potential to shame those that "underperform," has long been theorized as a potent form of social control.<sup>129</sup> Courts use this power within their role to establish reputational costs.<sup>130</sup> This is important when a States' capacity to comply with international judgments is negatively impacted by its inability to fulfill its traditional roles (economic and military) during the monitoring process. While the lack of enforcement mechanisms distinguishes international and domestic law, international law is not that dissimilar from constitutional and public law in the domestic realm.<sup>131</sup>

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<sup>127</sup> Karen J Alter, The multiple roles of international courts and tribunals: enforcement, dispute settlement, constitutional and administrative review, (2012) in *id.* at, (352). As of 2006, there were 12 permanent international Courts with administrative review authority (48% of international Courts). A large percentage of these operate in the international economic arena, where administrators are often responsible for implementing supranational regulations.

<sup>128</sup> *Id.* at, (350-1). If that does not occur, pressure from others, including States, helps

<sup>129</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. by Alan Sheridan (New York, NY: Vintage, 1995), 201-2, in Judith G Kelley & Beth A Simmons, *Politics by Number: Indicators as Social Pressure in International Relations*, 59 *AMERICAN JOURNAL OF POLITICAL SCIENCE*, 57 (2015).

<sup>130</sup> These powers include multiple State-specific compliance orders employing words for reputation and control. Thus, scarce ability to enforce judgments and scarce retributive aspects conceded in international Court mandates are supplemented with a great deal of power to name and shame.

<sup>131</sup> Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, *HARVARD LAW REVIEW* (2009). Oona Hathaway & Scott J Shapiro, *Outcasting: enforcement in domestic and international law*, *THE YALE LAW JOURNAL* (2011).

## V. COMPLIANCE IN INTERNATIONAL RELATIONS THEORIES

International Relations (IR) theories on compliance have traditionally assume that compliance is an act driven by State's actions, not reflecting entirely the interaction with Courts, in the international system to produce compliance. IR theories share the belief that States can uphold international judgments based on a calculated interest<sup>132</sup> (geopolitical, economic interest, even relative power of domestic political groups) or ideas develop around international systems.<sup>133</sup>

The four variants of this IR approach (outlined below) differ in the types of sources that they claim motivate the State's actions in IR— and I apply them to explore how these theories would explain the problem of noncompliance in the context of ICHR judgments.

### 1. Realism

Realism explains IR through analyzing material power—states act to protect or aggregate material power vis-à-vis other states. Thus, extensive noncompliance means that compliance with international rules brings no benefits to states in terms of their material power, position, and prospects and the states fail to comply does not threaten the material power of states. Or, put more plainly, noncompliance is an inconsistency between State interests and the international rules, including judgments: States act rationally with survival and competitive advantage in mind.<sup>134</sup> Traditionally, each country's economy, military

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<sup>132</sup> ALEXANDER M BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* XI (Yale University Press. 1986). Bickel believe that, "it is many actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest."

<sup>133</sup> Hathaway, *THE YALE LAW JOURNAL*, 1955 (2002).

<sup>134</sup> JOHN J MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (WW Norton & Company. 2001). (Explaining that a realist conceptualization of the world rests on four assumptions: the first is survival,

capacity or military spending and population are the sources of power underlying realism. According to this view, States are the unique actors with the power and material capabilities to survive in the logic of inter-State competition and affect politics, but military and economic forces determine a State's ability to compete<sup>135</sup> and influence dominance relationships.<sup>136</sup> To eliminate competition for hegemony and avoid violent relationships,<sup>137</sup> States willingly manage power relationships using international politics.<sup>138</sup> This balance of power encourages ever-more (militarily and economically) powerful States.<sup>139</sup>

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emphasizing that "survival is the principal goal of every State," which results from absence of a central authority, makes all other States potential enemies. The second is that States are rational actors acting to maximize their likelihood of continued existence. The third and fourth are military capacity, and economic, respectively. Both, as the author notes, are what make the Realist vision of IR essentially 'a story of Great Powers politics.' In sum, the States act rationally with survival in mind using their economic and military forces)

KENNETH NEAL WALTZ, *THEORY OF INTERNATIONAL POLITICS* 121 § 5 (McGraw-Hill New York. 1979). Waltz, who as the Father of Neorealism emphasized that, according to the Realist world view "[...]states must ensure their survival through maintaining or increasing their power in a self-help worl[d...]", which would justify States acting only for self-interest.

<sup>135</sup> MEARSHEIMER, *The tragedy of great power politics*. 2001. Also see David P. Fidler, *A Theory of Open-Source Anarchy*, 15 *INDIANA JOURNAL OF GLOBAL LEGAL STUDIES*, 266-7 (2008). Fidler emphasizes that under the logic of inter-State competition, the mercantilism accounts for how economic activity (development, trade and private enterprise) underlies the State-based notion with private production of resources that affect the State's international political position – either expanding its influence or establishing its relative position. The security dilemma, for instance, follows this logic. For more details, see, e.g., Robert Jervis, *Cooperation under the security dilemma*, 30 *WORLD POLITICS*, 167 (1978).

<sup>136</sup> It is from the dominance that hegemony emerges. The hegemon (leader State) creates rules for geopolitically subordinate States by implied power, 'the threat of the threat,' rather than direct military force. Hegemony is recognized as "the best strategy for a country to pursue, if it can." STEPHEN M WALT, *THE ORIGINS OF ALLIANCES* 5 (Cornell University Press. 1987). (He describes the predominance of one country over other countries) and ROSS HASSIG, *MEXICO AND THE SPANISH CONQUEST* 23-4 (University of Oklahoma Press. 2006). (Describing domination as 'the threat of the threat'.) (Walt had correctly observed that States balance against threats rather than against power alone. They recognize that power plays an important role, but in conjunction with geographic proximity, offensive capabilities, and perceived intentions, etc. For details, see the author's arguments presented in the Balance of Threat theory)

<sup>137</sup> WALTZ, *Theory of international politics*. 1979. Waltz States that hegemonic domination used by offensive realists only contributes to interstate conflicts and, thus must be replaced by the defensive realists' assumption regarding the balance of power system, which ensures that there will not be attacks among them.

<sup>138</sup> Under this scenario, favored in Kenneth Waltz's foundational *Theory of International Politics*, consensual peace is the price paid for ceding to the balance-of-power. International politics, and consequently compliance, is then reduced to a power fee, paid by the States that share it. Waltz, who summarizes the Realist credo: "[b]alance-of-power politics prevail wherever two, and only two requirements are met: that the order be anarchic (an anarchic system, where absence of a central authority reduces the international system to anarchy) and that it be populated by units wishing to



States can commit to tasks like creating and shaping IL, including review and enforcement institutions, such as international Courts, but they do so to maintain their share of power, or even increase it. Or, put in other words, serve their own interests. For realists, states may mobilize their power to comply with international HR commitments by coercion – powerful States seeking their own interests and ideological preferences, pressuring weaker States toward or away from compliance with HR.<sup>140</sup> In consequence, realists do acknowledge the existence of institutions but reject the idea that cooperation affects State interaction and interest seeking.<sup>141</sup> Complying with the rules and fulfilling the international commitment depends solely on the State's interest.<sup>142</sup>

Echoing Slaughter's conclusion, there is nothing misleading about a State committing to an obligation that it does not fulfill.<sup>143</sup> Since a State probably chooses noncompliance when it sees no material or power benefit in compliance, material interests and power relationships, not the force of international HR requirements, determine State actions.<sup>144</sup> The international institutions, then, are left without independent force to confront State utilitarian behavior, making them a reflection of such state calculations of

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survive[...]" At least to this point, it seems to coincide with Mearsheimer's ideas as expressed in *The Tragedy of Great Power Politics*.

<sup>139</sup> Fidler, *INDIANA JOURNAL OF GLOBAL LEGAL STUDIES*, 266 (2008).

<sup>140</sup> Helfer, *COLUMBIA LAW REVIEW*, 1842 (2002).

<sup>141</sup> Fidler, *INDIANA JOURNAL OF GLOBAL LEGAL STUDIES*, 267 (2008). David P. Fidler, *All Politics Is Global: Explaining International Regulatory Regimes*, 5 *PERSPECTIVES ON POLITICS* (2007). The text lucidly clarifies that the realist State-centric, power-oriented approach rejects regulatory cooperation, which intergovernmental organizations have.

<sup>142</sup> Helfer, *COLUMBIA LAW REVIEW*, (2002).

<sup>143</sup> Anne-Marie Slaughter, *International Relations, Principal Theory*, 3 *INTERNATIONAL RELATIONS*, 2 (2013). Given that realists argue that law can only be enforced through State power, this theory begs the question: why would a State decide to use its power for compliance unless it had a material interest in the result? If a State has a material interest in the result of IL, the State will use its power to comply with IL mandates.

<sup>144</sup> *Id.* at.

self-interest based on concerns about relative power, not a cause;<sup>145</sup> as a result, institutional outcomes invariably reflect the balance of power.<sup>146</sup>

## **2. Institutionalism**

Institutionalism, like Realism, accepts that States are rational unitary actors sharing incentives, relinquishing coercive power in order to seek objective self-interests in an anarchic world.<sup>147</sup> However, instead of focusing on State interests, they focus on institutions, claiming that, in certain situations, formal and informal international institutions can have an independent effect on state behavior. This assertion is what really distinguishes institutionalism from realism. Accordingly, institutionalism explains noncompliance as ineffectiveness of international institutions (e.g. intergovernmental organizations, the Court, or monitoring processes) to move States away from rational, self-interested behavior toward “cooperation” with mutually agreed upon rules.<sup>148</sup> In other words, under this view, the Court is an institution (a regime composed of substantive rules

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<sup>145</sup> Mearsheimer, *INTERNATIONAL SECURITY*, (1994). Mearsheimer claims that IL and its institutions are, a State desire- a simple expression of a State’s utilitarian behavior, not a cause. Some Neorelists – an outgrowth of classical realism—have theorized that IL has no independent impact on the State’s behavior. Raustiala & Slaughter, *HANDBOOK OF INTERNATIONAL RELATIONS*, 553 (2002). According to Slaughter (under this view) IL is, therefore, an epiphenomenon because the content is largely controlled by power or coercion.

<sup>146</sup> Mearsheimer, *INTERNATIONAL SECURITY*, (1994).

<sup>147</sup> Slaughter, *INTERNATIONAL RELATIONS*, paragraph 8 (2013). This view accounts for three nuances: intergovernmental institutionalism (e.g., Andrew Moravcsik, *Negotiating the Single European Act: national interests and conventional statecraft in the European Community*, 45 *INTERNATIONAL ORGANIZATION* (1991).); neoliberal institutionalism (e.g., Robert O Keohane, *Neoliberal Institutionalism: A perspective on world politics*, *INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY* (1989).) and new institutionalism (e.g., Duncan Snidal, *Political economy and international institutions*, 16 *INTERNATIONAL REVIEW OF LAW AND ECONOMICS* (1996).)

<sup>148</sup> Robert Keohane, O.(1984) *After Hegemony, COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY*, PRINCETON, NJ (1986). This author works recognized that the central insight is that “cooperation” may be a rational, self-interested strategy for countries to pursue under certain conditions.

and procedural mechanisms) and States fail to comply with Court judgments due to action or inaction by monitors in the implementation process.<sup>149</sup>

The Court's monitoring encourages compliance by channeling State interest into benefit and by tarnishing the international image of States who do not comply by making noncompliance public. When State behavior does not reflect the international commitment, institutions provide throughout the system information about these instances of noncompliance,<sup>150</sup> with consequences for cooperation, reciprocity and reputation. Since a State's reputation is directly related to its historical behavior, noncompliance that is noticed increases the probability of repercussions. Guzman emphasizes that consensual IL affects State compliance to the extent that other States believe that the State in question has a commitment that should be honored.<sup>151</sup> On that basis, direct sanctions (punishment or retaliation) are the most suitable short-term incentives, while reputational costs affect a State's long-term compliance.<sup>152</sup> When the stakes are relatively modest such as in the context of HR, States seek to preserve their reputation by complying. On the issues that receive the most IL attention such as economics, arms, war and borders, States fail to uphold their promises to cooperate on these issues and sanctions are unlikely to be effective.<sup>153</sup> Institutional intermediation can increase the cost of noncompliance in terms of

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<sup>149</sup> Barbara Koremenos, et al., *The rational design of international institutions*, 768 (2001). In this view, legal institutions are "rational, negotiated responses to the problems [States] face." Slaughter's idea that institutions are used to set boundaries and overcome the uncertainty that undermines cooperation by setting expectations – molding principles, norms, and decision-making procedures Slaughter, *INTERNATIONAL RELATIONS*, paragraph 10 (2013).

<sup>150</sup> Slaughter, *INTERNATIONAL RELATIONS*, paragraph 10-3 (2013). Slaughter noted that making transparent information about State behavior available IR between States. This increases efficiency because the rules of the game are pre-established, and States know how to behave.

<sup>151</sup> Guzman, *UNIVERSITY OF PENNSYLVANIA LAW REVIEW*, 72-84 (2008).

<sup>152</sup> *Id.* at.

<sup>153</sup> Hathaway, *THE YALE LAW JOURNAL*, 1951 (2002).

reciprocity or reputation only.<sup>154</sup> Or, put more plainly, “cheating can be a serious barrier to cooperation.”<sup>155</sup> However, institutionalists emphasize only State absolute gains and underemphasize relative gains.<sup>156</sup> Domestic factors can also hinder compliance and when noncompliance is the result of multiple actors Institutionalism is best complemented with a pluralist IR explanation, as in Liberalism and Constructivism discussed below.

### **3. Liberalism**

Going beyond the simplistic view of the rational unitary actor, Liberalism argues that the state’s international behavior is determined by political actors and processes within the state. These actors and processes shape the state’s national interests by using domestic politics (e.g. representative governments, elections, lobbying, law-making process) and transnational activities (e.g. trade, civil society activism).<sup>157</sup> States remain important players in international politics under this theory, however, neglects the State actor’s direct power in it because the State only filtered the impact of non-State actor.<sup>158</sup> Accordingly,

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<sup>154</sup> Snidal, *INTERNATIONAL REVIEW OF LAW AND ECONOMICS*, 124 (1996). States appear less concerned with cooperation and international organizations than with creating a norm that coordinates reciprocity, as Snidal argued. Slaughter, *INTERNATIONAL RELATIONS*, paragraph 10 (2013). She recognizes that “[...]ountries that know they must interact with the same partners repeatedly through an institution will instead have incentives to comply with agreements in the short term so that they might continue to extract the benefits of co-operation in the long terms,” paragraph 10.

<sup>155</sup> Mearsheimer, *INTERNATIONAL SECURITY*, 19 (1994).

<sup>156</sup> *Id.* at, 19-21.

<sup>157</sup> Andrew Moravcsik, *Taking preferences seriously: A liberal theory of international politics*, 51 *INTERNATIONAL ORGANIZATION*, 5 (1997). The author lists the three assumptions at the heart of Liberalism. First, non-State actors are fundamental in world politics; second, States represent some dominant subset of domestic society, whose interest they serve; and third, State behavior is determined by the configuration of preferences in the international system. Fidler, *PERSPECTIVES ON POLITICS*, (2007).; Fidler, *INDIANA JOURNAL OF GLOBAL LEGAL STUDIES*, (2008). Fidler noted that in DANIEL W DREZNER, *ALL POLITICS IS GLOBAL* 6 (Cambridge Univ Press. 2007). Drezner follows Liberalism’s account of intergovernmental organizations’ or non-State actors’ role in international regulatory politics. He describes a two-step dynamic. First, State preferences originate from domestic actors and institutions and second, interests and capabilities are distributed as a function of these preferences. Likewise, Fidler notes that intergovernmental organizations or non-State actors impact State policy through domestic politics and transnational activities that shape the content of State policy preferences in IR.

<sup>158</sup> Fidler, *INDIANA JOURNAL OF GLOBAL LEGAL STUDIES*, 269 (2008).

under liberal theory, noncompliance is a failure of domestic actors and political processes to support and advance compliance as a State interest.

When the State is seen as a multiplicity of actors, international norms and judgments exert impact on State interests as incentives.<sup>159</sup> Scholars claim that liberal States rest on international norms in their international relations, and on international Court judgment in resolving international disputes—at least in their relations with other liberal States.<sup>160</sup> Moravcsik’s republican liberal theory suggests that compliance with HR regimes changes behavior in liberal nations.<sup>161</sup> This would explain why Liberalists assume – and perhaps they are right – that “compliance with the European HR System (largely by liberal democracies) is stronger than it is with developing HR System [such as the African or Inter-American], which addresses a collection of [liberal] democratic and [ex-] authoritarian States.”<sup>162</sup>

Using the liberal internationalist model of transnational legal relations, Courts have secured HR incorporating international norms and judgments into the domestic legal system (a global policy form). According to Slaughter, Courts may have greater long-term impact on the strength of the domestic judicial system. However, they only influence State behavior when compliance has become a preference.<sup>163</sup> If compliance happens to be, for whatever reason, a State’s preference (of non-state actors), it may appear that the institution

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<sup>159</sup> Robert O Keohane, International relations and international law: two optics, 38 HARV. INT’L LJ, 119 (1997).

<sup>160</sup> JEFFREY L DUNOFF, et al., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 30 (Aspen Publishers. 2010).

<sup>161</sup> Moravcsik, INTERNATIONAL ORGANIZATION, 219-220; 229 (2000). He emphasizes that incipient democracies (“newly established and potentially unstable democracies”) grow more roots in HR regimes than established democracies or non-democracies. In the incipient, popular sovereignty and enforcement of HR are used to reduce the uncertainty that threatens to undermine the democratic rule of law.

<sup>162</sup> DUNOFF, et al., International law: norms, actors, process: a problem-oriented approach 30. 2010.

<sup>163</sup> Slaughter, INTERNATIONAL RELATIONS, paragraph 19 (2013). International Tribunals such as International Criminal Courts (ICC) and International HR Tribunals (ECHR and ICHR).

is influencing the political actors and processes within the State, but as Goldsmith and others have argued, this appearance is illusory.<sup>164</sup> IL has few mechanisms for considering State preferences.<sup>165</sup> As Hathaway asserts, under this view, “State decisions in the international realm [require] understanding the domestic politics that underlie them.”<sup>166</sup>

#### **4. Constructivism**

Under this school, “States have no preexisting interests; rather, State interests are created and changed by and through [the interactions of state and non-state actors. Thus, IR is explained by looking at the social construction of ideas that occurs through these interactions]. Participation in international institutions helps States achieve shared understandings.”<sup>167</sup> These understandings, in turn, alter a State’s perception of its own interests. State behavior is mediated by social norms.<sup>168</sup> These social norms, including compliance and noncompliance, are socially constructed.<sup>169</sup> Thus, noncompliance indicates

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<sup>164</sup> Eric Posner & Jack Goldsmith, The new international law scholarship, *GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW*, FORTHCOMING, 463, 472 (2006). See also JACK L GOLDSMITH & ERIC A POSNER, *THE LIMITS OF INTERNATIONAL LAW* (Oxford University Press. 2005).

<sup>165</sup> Slaughter, *INTERNATIONAL RELATIONS*, paragraph 18 (2013). She affirms that this divergence presents a special challenge to IL scholars.

<sup>166</sup> Hathaway, *THE YALE LAW JOURNAL*, 1953 (2002).

<sup>167</sup> DUNOFF, et al., *International law: norms, actors, process: a problem-oriented approach* 30. 2010.

<sup>168</sup> James G March, og Johan P. Olsen (1989) *Rediscovering Institutions. The organizational basis of politics* (New York: The Free Press). As illustrated by Olsen, State behavior is mediated by social norms, rather than State interest, consequently, it could be affirmed that international social norms shape and change foreign policy over time, rather than State interest exclusively. Slaughter, *INTERNATIONAL RELATIONS*, paragraph (2013). Following March and Olsen, Slaughter explains that Constructivists distinguish between a ‘logic of consequences’—where actions are rationally chosen to maximize the interests of a State—and ‘logic of appropriateness’, where rationality is heavily mediated by social norms. For example, Constructivists would argue that the norm of State sovereignty has profoundly influenced international relations, creating a predisposition for non- interference that precedes any cost-benefit analysis States may undertake. These arguments fit under the Institutional rubric of explaining international co-operation, but based on constructed attitudes rather than the rational pursuit of objective interests.” For further information, see James G March & Johan P Olsen, *The institutional dynamics of international political orders*, 52 *INTERNATIONAL ORGANIZATION*, 943-69 (1998).

<sup>169</sup> Expanding on Constructivist ideas in the works presented by: ROBERT O KEOHANE, *INTERNATIONAL INSTITUTIONS: TWO APPROACHES* 379-96 (Springer. 1989).; and KRATOCHWIL, *Rules, norms, and decisions: on the conditions of practical and legal reasoning in international relations and domestic affairs*. 1991. On the basis of these works it has been asserted that early Constructivist scholars emphasized

weak social construction of the norm of “compliance” with HR rules,<sup>170</sup> or, lack of participation in the set of ideas and interactions under the HR System.

The way in which international institutions are involved in the social construction processes of an actor's interests has been examined by Martha Finnemore. State interests, she explains, “are constructed through social interaction.”<sup>171</sup> She provides three case studies of such construction.<sup>172</sup> By focusing on how international institutions use persuasive rhetoric and language to influence State behavior and construct the social reality of the international system, constructivists are often seen as more optimistic about progress in IR than versions of realism.<sup>173</sup> These institutions are actors in the international bureaucracy, pursuing their own interests, even those contradictory to the interests of the States<sup>174</sup> that created them (e.g. HR Courts).<sup>175</sup> The administration in power must comply with international norms and judgments in order to prevent domestic actors from rising up

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mechanisms that drew on the normative power of rules and the importance of shared knowledge and discourse in shaping identity and interests.

<sup>170</sup> JEFFREY T CHECKEL, WHY COMPLY?: CONSTRUCTIVISM, SOCIAL NORMS AND THE STUDY OF INTERNATIONAL INSTITUTIONS (Arena. 1999). From a constructivist perspective, compliance is less a matter of rational calculation or imposed constraints than of internalized identities and norms of appropriate behavior. It is a line of theory that is particularly congenial to many IL scholars. ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (Cambridge University Press. 1999); Alexander Wendt, Constructing international politics, 20 INTERNATIONAL SECURITY (1995). Wendt provided detailed explanations of the importance of social meaning for this school and contributed to understanding of State behavior within IR in Constructing International Politics.

<sup>171</sup> Martha Finnemore, National interests in international society, 6-7 (1996).

<sup>172</sup> Id. at, 45; 73; 121

<sup>173</sup> MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS 16 (Cornell University Press. 2004). This piece has the merit of placing more attention on the role of bureaucracies in IR on topics such as free trade or HR protection and in that context, IL institutions become more than pawns of the States.

<sup>174</sup> THOMAS RISSE-KAPPEN, et al., THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE § 66 (Cambridge University Press. 1999). While constructivists in IR have not generally tackled compliance per se, they are starting to take into account, as see in CHECKEL, Why comply?: constructivism, social norms and the study of international institutions. 1999. Because constructivism replaces simplistic notions of rationality in which States only pursue survival, power or interest.

<sup>175</sup> MARGARET E KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 5; 7 (Cambridge Univ Press. 1998). The authors spend a great deal of time explaining the role of transnational actors, stating, for example, that transnational corporations have used persuasive rhetoric, including lobbying, to help form “norm entrepreneurs”, which are able to not only influence State behavior, but also to alter State beliefs about issues like use of land mines in war or international trade. Slaughter, INTERNATIONAL RELATIONS, paragraph 23 (2013). She makes similar observations in it.

against it.<sup>176</sup> Since State interests seem to no longer be the only interests that matter, modifications of interests form continuous “feedback loops” that effect social changes.<sup>177</sup> Constructivists see the structure of IR as primarily ideational, rather than material; they are not necessarily wedded to focusing their analysis on the State as unit.<sup>178</sup> It remains unclear why leading constructivists focused on construction of State interests, which are more material than purely ideational.<sup>179</sup> However, studying the nature of State behavior and its formation is integral in Constructivism methodology to explaining the international system. Constructivism endorses an immaterial and ideational ability of international institutions to affect IR by shaping State’s perception and interest. While they acknowledge the role of institutions in the international affairs, the Court’s impact is filtered through social norms.<sup>180</sup> Constructivism provides for the possibility that international institutions affect social norms, however, States are granted certain privileges to act in constructivism as States wield greater material power than institutions. More interesting, constructivism focuses on the process of change rather than on its ends and cannot predict the future of international politics<sup>181</sup> such as compliance with international institutions.

*Individually*, each IR theory (realism, institutionalism, liberalism, and constructivism) explains noncompliance in a different way. Realism explains noncompliance as an inconsistency between the international judgment and state interests: states fail to comply because it is not in their interest to do so, or because the political costs of compliance outweigh the benefits. To describe case-specific noncompliance, we must

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<sup>176</sup> BARNETT & FINNEMORE, *Rules for the world: International organizations in global politics*. 2004. They also explore how bureaucracies affect State behavior.

<sup>177</sup> Fidler, *INDIANA JOURNAL OF GLOBAL LEGAL STUDIES*, 270 (2008).

<sup>178</sup> Finnemore, 6-7 (1996).; WENDT, *Social theory of international politics* 29-33. 1999.

<sup>179</sup> Fidler, *INDIANA JOURNAL OF GLOBAL LEGAL STUDIES*, 270-1 (2008).

<sup>180</sup> *Id.* at, 270.

<sup>181</sup> *Id.* at, 132-3.



determine whether the demands of the judgment would result in a gain or loss in terms of material power. Institutionalism explains noncompliance as the ineffectiveness of intergovernmental or monitoring process institutions to move states away from rational, self-interested behavior toward cooperation with mutually agreed upon rules: States fail to comply due to action or inaction by monitors in the implementation process. For liberalism, noncompliance can be a consequence of domestic political actors and processes that do not value compliance and, thus, do not articulate and advance compliance as a state interest: states fail to comply because of domestic factors. Constructivism tells us that ideas, including noncompliance, are socially constructed. So, noncompliance indicates weak social construction of “compliance” with HR rules and judgments. None of the IR theories explain more than a portion of compliance and noncompliance; they are individually insufficient.

*In aggregate*, these IR theories recognize the interaction between the actors involved in compliance and noncompliance. In this interaction, the Court might act strategically, using some tactics/strategies to increase the probability that its judgments will be upheld because noncompliance is costly to the system and its “position [within the] system.”<sup>182</sup> However, IR theories do not provide a detailed explanation of the court’s capacity to exercise its state-delegated power nor how that power can participate of states preferences, impacting ideas about compliance and noncompliance (e.g., feeding or confronting strategy of states). In this way, IR theories limit the Courts’ powers to justify their decisions and earn a role in the State’s actions through their interaction.

Realism and Institutionalism subordinate the courts’ powers (or their participation) in the process of interaction that produces noncompliance to the power of States. The

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<sup>182</sup> Vanberg, AMERICAN JOURNAL OF POLITICAL SCIENCE, 349 (2001).

reason is that realism and institutionalism focus on interstate interactions. The court's exercise of power cannot be accommodated in the scenario in which states exercise their material power to affect compliance i.e., they do not assign material power to parties other than the States. Thus, under these theories, the role of Courts, their ability to influence IR and participate in state strategies via interaction is underestimated. Realism asserts that Court does not hold independent power. Thus, Courts reflect state calculations of self-interests based on the concept of power; as a result, institutional outcomes reflect the balance of power. Institutionalism places the Court as a "norms-motivated actor"<sup>183</sup> and assigns it some cooperative functions in the international system. Institutions can change state behavior but not independently because they performed valuable tasks without frontally challenging State sovereign.

Similarly, liberalism and constructivism subordinate the courts' powers (or their participation) in the process of interaction to the power of non-state actors and the ideas of the system. Liberalism and Constructivism acknowledge the possible influence of Courts on national and international politics, but only within the formation of state preference or socially constructed ideas, neglecting its ability to exercise direct material power.

Liberalism recognizes, to some extent, that the Court interacts with non-state actors and the system at the cost of limiting the Court's power in its interactions because the real action for liberalism comes through non-state actors facilitating or blocking international politics and compliance. Constructivism assumes that compliance and noncompliance are equally constructed by the interactions of States, state actors and international institutions like Courts (constructivism). However, even when it appears to give theoretical importance to the courts it places too much emphasis on the process than outcomes (such as compliance

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<sup>183</sup> Kapiszewski & Taylor, *LAW & SOCIAL INQUIRY*, 822 (2013).

and noncompliance), which does not take into consideration the Court’s normative ability to influence compliance. Thus, these IR theories do not systematically account for the nuance and complexity of the interaction between States and Court, and its consequences for compliance.

Table A. IR Theory and ICHR noncompliance<sup>184</sup>

IR Theory	General Explanation of Extensive Noncompliance in the Inter-American System	Category of Noncompliance Identified in Qualitative/ Quantitative Analysis of Specific Cases
Realism	Extensive noncompliance means that compliance brings no material power benefits and noncompliance does not threaten the material power of states (i.e., extensive non-compliance shows that HR norms do not independently affect state power calculations in a condition of structural anarchy)	Noncompliance because cases trigger state opposition to the intrusiveness, scale, or substantive conclusions of judgments because such judgments threaten the state’s material power vis-à-vis other states
Institutionalism	Extensive noncompliance means institutions are not altering rational, self-interested state behavior in the context of HR (i.e., institutions are not “lengthening the shadow of the future” for states in HR terms in international politics)	Noncompliance because cases involve weak intergovernmental institutions (e.g., lack of authority or capacity) that fail to exercise constraint on rational state interests in non-compliance
Liberalism	Extensive noncompliance means domestic interest formation does not support compliance (i.e., domestic political processes do not seem to place much value on compliance and, thus, do not articulate and advance compliance as a state interest)	Noncompliance because cases lack grounding in domestic political interests and processes, leading to a failure of “bottom up” support for compliance with judgments
Constructivism	Extensive noncompliance means that social construction of “compliance” with HR rules and judgments as an idea/norm is weak across ICHR members (i.e., compliance with HR rules is not constitutive of participation in the IA human rights system)	Noncompliance because cases reveal weak or non-existent support for or belief in compliance as an idea within countries and/or across the region

*In summary*, the states’ and Court’s roles have not received the same systematic scholarly attention. Over the last twenty years, literature on Court actions demonstrated a gap between the creation of authorities/Courts meant to counteract States’ failures in complying with international judgments and IR based compliance theories. This gap arises from placing too much emphasis on States, non-state actors or System without a

<sup>184</sup> Professor David Fidler’s table, Maurer Law School, IUB. Professor Fidler formulates this table to summarize the explanations that the IR theories offer to the extensive noncompliance with ICHR judgments.

deeper account the Court's potential ability (as international institution) to influence noncompliance through their interaction with States, non-state actors, and the System,

## CHAPTER TWO:

### METHODOLOGY

#### I. INTRODUCTION

This chapter will discuss the methodology that guided the study. It consists of three sections. The first is a brief description of the general assumptions underlying the qualitative approach, the particular variant that I used, how the sample was selected, and finally (the tool) – analytical software. The second section discusses the data analysis process; the third explains how I created the original codes, how and why they evolved, and how particular codes fit together.

##### **Methodological approach**

As argued in Chapter 1, since noncompliance has been defined almost exclusively in relation to compliance and from the perspective of State actions, relatively little is known regarding how noncompliance plays out in the interaction between States and the Court during the Court proceedings and monitoring processes. Qualitative research is particularly well-suited to inquiring into *unexplored* areas about which very little is known.<sup>1</sup> The qualitative methodology used in this dissertation is Grounded Theory (hereinafter: GT), which involves generating explanatory theories and hypothesis from an analysis of the data set rather than generating initial theories at the outset, which are then

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<sup>1</sup> See generally CARL F. AUERBACH & LOUISE B. SILVERSTEIN, *QUALITATIVE DATA: AN INTRODUCTION TO CODING AND ANALYSIS* (NYU press. 2003).

tested, by data analysis.<sup>2</sup> It turns away from preconceived ideas, extant theories, and large samples in favor of analysis of data-based categories<sup>3</sup> and sequential data collection in order to construct theory.<sup>4</sup>

### **A. Grounded theory as a methodological approach and data gathering**

Qualitative research is quite diverse, but for this research question—*How do States move toward or away from compliance in their interaction with the Court and its judgments?* — It can be employed to analyze judgment *patterns* related to interactions between States and the Court in both the proceedings and monitoring that provide a “thick”<sup>5</sup> description of the phenomenon being studied. While quantitative analysis can reveal causation, the potential relationships between factors contributing to compliance are not always well reflected by numerically defined variables. Thus, even quantitative studies yielding significant results reveal very little about compliance.<sup>6</sup> Alternately,

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<sup>2</sup> Kathy Charmaz, *Constructing grounded theory: A practical guide through qualitative research* 61 (London: Sage 2006).

<sup>3</sup> ANSELM STRAUSS & JULIET M. CORBIN, *BASICS OF QUALITATIVE RESEARCH: GROUNDED THEORY PROCEDURES AND TECHNIQUES* (Sage Publications, Inc. 1990).

<sup>4</sup> Charmaz, *Constructing grounded theory: A practical guide through qualitative research*. 2006.

<sup>5</sup> CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* § 5019 (Basic books. 1973). CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* § 5110 (Basic books. 1983). Clifford Geertz, *Thick description: Toward an interpretive theory of culture*, *THE INTERPRETATION OF CULTURES* (2002).

<sup>6</sup> I prioritized the qualitative analytic model over the traditional quantitative model I’d originally envisioned. A consistent assessment of noncompliance required going beyond the cause testing applied in IR and IL, to examine why States create Courts empowered to constrain it and why such Courts might exercise powers. Since the role of the Court has not received the same systematic scholarly attention, current theory cannot highlight the structural differences or similarities between the States and Court that lead to behavioral patterns that favor compliance/noncompliance in their reciprocal interactions. We know a great deal more about how the Court works than we did at the beginning of this process, particularly about the practical realities of noncompliance and the State, Court and their interaction, which the quantitative method was unable to uncover.

qualitative analysis can uncover multiple and complex interactions,<sup>7</sup> resulting in a deeper and more meaningful understanding of underlying motivations for compliance.

Qualitative methods are well-suited for assessing the mechanisms of behavioral change.<sup>8</sup> They can be used to understand the particular paths through which legal rules affect individuals, States and organizations and, then, to generate theory.<sup>9</sup> Under GT, patterns— *what the data says*—<sup>10</sup> are generated through a data analysis procedure. This data analysis procedure is called theoretical coding. Accordingly, the theoretical coding is used to fully explore and analyze all existing data. This theoretical coding can be used to trace paths between Court judgment and subsequent action by State in order to generate hypotheses/theories.<sup>11</sup> In this method, the theory is the process (i.e., a *processual*, abstract, and descriptive theory) in which concepts associated through relationships constitute an integrated framework to explain or predict phenomena.

This dissertation analyzes the *process* in which certain factors cluster together in particular ways; it can affect compliance in predictable ways, and interact.<sup>12</sup> As discussed in Chapter 1, existing ideas regarding the factors that influence compliance are grouped into independent literatures.<sup>13</sup> They do not provide a comprehensive theory of compliance, but a unified theory for multiple factors, which could be too abstract to be

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<sup>7</sup> See generally Kapiszewski & Taylor, *LAW & SOCIAL INQUIRY*, 804 (2013).

<sup>8</sup> See Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 *AMERICAN JOURNAL OF INTERNATIONAL LAW*, 5 (2012).

<sup>9</sup> *Id.* at.

<sup>10</sup> AUERBACH & SILVERSTEIN, *Qualitative data: An introduction to coding and analysis*. 2003.

<sup>11</sup> David Collier, *Understanding process tracing*, 44 *PS: POLITICAL SCIENCE & POLITICS* (2011).

<sup>12</sup> Julien Etienne, *Compliance theory: A goal framing approach*, 33 *LAW & POLICY* (2011). (1)

<sup>13</sup> One large body of work addresses compliance by civilians, public authorities (e.g., executives, legislatures, or bureaucracies), and subnational public authorities (e.g., lower federal or State Courts) with domestic laws and with the rulings of national Courts, while the other addresses State compliance with international law and Courts.

useful.<sup>14</sup> The option is distinguishing factors contributing to compliance from those contributing to noncompliance this is crucial to understanding the effects of each within its particular context/process. In practice, noncompliance speaks (or can speak) less to the relevance of factors encouraging compliance and more to the strength of the factors encouraging noncompliance.<sup>15</sup>

The use of qualitative methods depends on the previously acquired knowledge and the question asked.<sup>16</sup> The Straussian GT school considers, for instance, researchers with a general idea of the area under study. These researchers need forcing the emergence of theory with structured questions. My dissertation centers on the Straussian strategy since it allows starting the research with extant theories (or brief literature) in connection with explaining a problem. These extant theories do not require be tested against since the generated and real data that is meaningful are the themes that emerge. Accordingly, theories are posited for two reasons: having a general idea of where to begin and to motivate questions only. The application of questions helps beginners (like me) to force responses into restricted theoretical codes. For instance, literature and questions are useful to check whether theoretical codes interpret the data appropriately. See further details of this strategy adapted from Jones and Alony, 2011 (in footnote).<sup>17</sup>

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<sup>14</sup> Kapiszewski & Taylor, LAW & SOCIAL INQUIRY, 824 (2013).

<sup>15</sup> Schauer, Frederick, Comparative Constitutional Compliance: Notes Towards a Research Agenda 120-42 (130-31) in MAURICE ADAMS & JACCO BOMHOFF, PRACTICE AND THEORY IN COMPARATIVE LAW (Cambridge University Press. 2012).

<sup>16</sup> See Shaffer & Ginsburg, AMERICAN JOURNAL OF INTERNATIONAL LAW, 5 (2012).

<sup>17</sup> Michael Jones & Irit Alony, *Guiding the use of grounded theory in doctoral studies—An example from the Australian film industry*, (2011). (This strategy also considers: Making conceptual descriptions (descriptions of situations, process, interactions); theoretical sensitivity comes from methods and tools; the theory (grounded on data) is interpreted by an observer, (the extant theories are not used); the credibility of the theory comes from the rigour of the method; basic social processes need *not* be identified; the researcher is active; data is structured to reveal the theory; coding is more rigorous and defined by technique; the researcher use open (identifying, naming, categorizing and describing phenomena), axial (the process of relating codes to each other) and selective (choosing a core



## **B. Focus**

This dissertation limits its focus on State behavior to state relationships with the ICHR and analyzes their influence on the ICHR, and vice versa. This analysis is, thus, primarily an exercise of looking at what is happening under the surface of the interactions between States and the Court within judicial proceedings and monitoring as the consequence of judgment compliance. From the exercise that I undertook – a surprising preliminary finding was identified. This finding is that acquiescence leads to lower judgment compliance rates. This finding emerged strongest from the process and formed a substantial conceptual part of my analysis. Paying attention, on purpose, to this finding along with an understanding of its particular components did not exist in the domain of knowledge to a far greater degree than my data demonstrates. This chapter thus explains the full process that uncovered a formerly unexplored finding of my study.

Having described the method and focus, it is now necessary to introduce the cases to which the method of exploration was applied.

## **C. Case Selection**

Between its founding and 2010, the Court has ruled on 129 cases. I started by using a 28 cases sample. Sampling was a continuous process that required information to elucidate the relevance of the emerging categories.<sup>18</sup> The process of exploration of my data made it possible to identify the unexpected preliminary finding of the relationship between acquiescence and compliance that was previously mentioned. The data gave to this preliminary finding its status of influencing everything, thus, I understand the

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category and comparing other categories to that) coding and it is a form of qualitative data analysis (QDA)).

<sup>18</sup> Charmaz, *Constructing grounded theory: A practical guide through qualitative research* 189. 2006.

pervasiveness of this finding to identify patterns of association between cases. However, there was no numerical data on whether States that have acquiesced have higher or lower rates of compliance with Court judgments. To elaborate the finding, I had to verify using both compliance and noncompliance through an extended sample.<sup>19</sup> Consequently, towards the end of my research, a database documenting 129 cases listed in the Inter-American Court's 2010 Annual Report was created to explore patterns of compliance/noncompliance (please find details by case in Appendix A).

129 cases constitute a sufficiently large sample to uncover patterns, gain a deeper understanding and generate theory.<sup>20</sup> There are 20 States amidst these cases, and there is a 14-year time difference (1996-2010) between the oldest and most recent judgments included in the sample. Rather than measuring the same amount of time for each case, this research explores the entire monitoring process until 2015, including 19 years for the oldest judgment and, at least, five-year post-judgment for recent cases.

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<sup>19</sup> JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* (Cambridge University Press. 2012).

<sup>20</sup> Out of the 129 cases, 118 were under the monitoring and 11 are not it. In these 11 cases, the process has not normally developed until its completion and the Court to do not place them under monitoring or to remove from it. The Court ruled the case inadmissible (did not accept the interposed petition) and shelved the case in: *Viviana Gallardo v. Costa Rica* by Order dated September 8, 1983 as recorded in the 1984 Annual Report at 39, Appendix II; in the *Fairén Garbí and Solís Corrales v. Honduras* by Judgment dated March 15, 1989 as recorded in the 1989 Annual Report at 71 the Court released the demanded State from all responsibility, Appendix III; in *Cayara v. Peru* via judgment on objections dated February 3, 1993 as recorded in the 1993 Annual Report at 25, Appendix III the Court accepted three of the objections interposed; in the *Nogueira de Carvalho v. Brazil* by Judgment the case was shelved since the lack of evidence to demonstrate the international responsibility of the State, dated November 28, 2006 that was included in 1988 Annual Report at 12-13; the Court admitted objection and shelved the case in the *Maqueda v. Argentina* by Judgment dated January 17, 1995 that was included in 1995 Annual Report at 31, Appendix II and in the *Alfonso Martín del Campo Dobb v. Mexico*, the Court admitted objection by Judgment dated September 3, 2004 that was included in 2004 Annual Report at 8, Appendix XIX; the Court does not require monitoring for the *Velasquez-Rodriguez v. Honduras* by Judgment on Reparations dated July 21, 1989, and in *Aloeboetoe v. Suriname* in the reparations and costs judgment dated September 10, 1993. Finally, the Court terminated the case by party request in *Godínez Cruz v. Honduras*, by order dated September 10, 1996. The Court closed the case for compliance without ordering monitoring in: *Gangaram Panday v. Suriname* by Order dated November 27, 1998 and did not order monitoring in *Genie-Lacayo v. Nicaragua* in the judgment dated January 29, 1997 that was included in 1997 Annual Report at 39; Appendix I

This selection method forms a reasonable approximation of reality that is not easily distorted. In addition, it accounts for differences between cases that provide accurate updates on the States' historical behavior. Thereby, it gained representativeness.<sup>21</sup> Amplifying the window of access to all the cases was central to the generation of my theory and it was the basis for the Results Chapter Three.

#### **D. NVIVO Software**

I chose to use NVIVO software to aid in analysis because it offers a set of tools for analyzing large volumes of rich, textual data. This research on noncompliance is a large-scale qualitative analysis that entails inherently complex and indeterminate evaluations of large volumes of data — more than 738 types of remedies related to 129 cases.<sup>22</sup> Since NVIVO's tools allow classification, sorting and arrangement of unstructured information, it was crucial to bottom-up coding and analysis. NVIVO's support started with more detailed code and worked up to broader categories,<sup>23</sup> allowing for an examination of otherwise unverifiable relationships in the data.

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<sup>21</sup> See Appendix A for further details. Bear in mind that the distribution of the 118 monitored cases among the 20 member States is available in Appendix A.

<sup>22</sup> There are 731 obligations ordered in the 118 cases that were under monitoring as of 2010. In addition, there are seven obligations ordered among those 11 cases in where it was not open a monitoring.

<sup>23</sup> While broad-brush coding relies on the capacity of the software to facilitate recoding, or coding on from text at a code, coding in detail makes use of the capacity in the software to cluster like things together in a hierarchical (tree-structured) system, to gather related concepts in a set, or perhaps to merge codes.

## II. DATA ANALYSIS

My dissertation centers on theory generation<sup>24</sup> in which GT analysis uses organization/reorganization to deconstruct/construct and thereby broadens understanding of phenomena.<sup>25</sup>

This section describes how I deconstructed, and subsequently reorganized data to provide an understanding of how patterns of noncompliance are related to *processes* of interactions between States and the Court in both the judicial proceedings and monitoring processes. Analysis, using the GT method generally includes two levels of categories: themes and theories.<sup>26</sup> Themes are repeating ideas and concepts that use relatively equivalent words, phrases and meanings. Themes stand in logical relation to each other, and are grouped coherently. One creates a theory by assessing themes –a series of patterns together, such as the patterns uncovered in the cases. In this way, theory emerges from data analysis. In order to move themes/patterns into justifiable theories, I used NVIVO to identify patterns to be categorized.

I established the following coding protocol.<sup>27</sup> First, once my cases were in the NVIVO platform, I began the *initial* coding process informed by reading each selected cases. Within a process of constant comparison, I reviewed and deconstructed judgments

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<sup>24</sup> See generally B.G. Glaser, Basics of Grounded Theory Analysis (1992). He stresses that outside the substantive area in which a theory was generated, GT method should be easily applied.

<sup>25</sup> See generally A. Strauss & J. M. Corbin, Basics of qualitative research: Grounded Theory Procedures and Techniques (2d ed., 1988).

<sup>26</sup> MATTHEW B. MILES & A. MICHAEL HUBERMAN, QUALITATIVE DATA ANALYSIS: AN EXPANDED SOURCEBOOK (Sage. 1994). Lyn Richards & Tom Richards, From filing cabinet to computer, ANALYZING QUALITATIVE DATA (1994); T. Richards & Lyn Richards, Using computers in qualitative research, 1 METHODS (1994).

<sup>27</sup> JOHNNY SALDAÑA, THE CODING MANUAL FOR QUALITATIVE RESEARCHERS 151 (Sage. 2012). (“Protocol coding is the collection and, in particular, the coding of qualitative data according to a pre-established, recommended, standardized, or prescribed system.”)

by themes.<sup>28</sup> The goal was to capture the finer nuances of meaning with sufficient context.<sup>29</sup> The first half-dozen or so cases were coded this way. Afterwards, I was able to develop a workable list of codes to apply case after case.

Subsequently, I analyzed State responses and Court requests according to a code list (or system), in such a way as to identify relevant patterns. With this information, I began the process of *axial* coding - constructing data that was deconstructed during initial coding – and grouping categories into main and subcategories.<sup>30</sup>

The final step was *selective* coding – the process of integrating and refining categories<sup>31</sup> (with respective subcategories) for the compliance outcomes. Initially their placement into a visual coding schema by which elements in a category are more similar to each other than those outside it. All categories in the same place serve to facilitate comparison and assembly of sets. However, a hunch led to the development of a theoretical schema that explained how each of the categories related to each other. Thus, putting the set together is more like making theoretical connections between categories that occur together, or somehow influence each other.<sup>32</sup> The following lists grouped the final (main) categories (see Appendix B for the full code system):

**I. The Compliance Outcomes**

**II. Judgment attributes**

**III. State responses**

**IV. Court requests**

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<sup>28</sup> A Strauss, Corbin (1998) Basics of Qualitative Research, TECHNIQUES AND PROCEDURES FOR DEVELOPING GROUNDED THEORY. THOUSAND OAKS, 102-828.

<sup>29</sup> H HENRY RUSSELL BERNARD & GERY W RYAN, ANALYZING QUALITATIVE DATA: SYSTEMATIC APPROACHES (SAGE publications. 2009).

<sup>30</sup> SALDAÑA, The coding manual for qualitative researchers. 2012.

<sup>31</sup> Id. at.

<sup>32</sup> PATRICIA BAZELEY & KRISTI JACKSON, QUALITATIVE DATA ANALYSIS WITH NVIVO (Sage Publications Limited. 2013).

## **V. Relationship State responses—Court requests**

The code list begins with the outcomes: full compliance and noncompliance. These two primary categories force States and the Court in their international relations to formulate and articulate their interests and goals connected with the international HR process. The States' language showed descriptions about the Court judgments. In this way, the code shifted its focus to descriptive information as the second category. This descriptive information allows comparing, filtering and identifying patterns of association between judgments and cases. While this second group was informative about the outcomes, this dissertation ultimately focused on the third and fourth group of codes. These groups allowed visualizing the interaction between States and the Court. Here the States and reports on their compliance, and the Court' language reflected interpretations, assumptions, and evaluations of their behavior.

The third group contains the concrete State responses that connect to conceptual reasons why compliance is a global political concern for States. These responses comprised twelve subcategories. These subcategories operate distinctly from the five Court requests that are the fourth group that connect to other goals/principles. The coding system permitted the identification of those efforts by which States and the Court solidify their interests and goals and tracks the individual progress (or lack thereof). It identified proposals that facilitate or prevent the progress of their efforts.

The focus on this interaction emphasized the relationship between State and the Court and how they address the noncompliance problem. The fifth group coded is the impact of State responses on Court requests and vice versa. This relationship is developed

from two processes, structured in five Stages and regarding specific goals. What follows is an example of this process of coding/creation of categories and subcategories.

### III. DEFINING THE CREATION OF CODES/CATEGORIES AND SUBCATEGORIES.

This sub-section includes the codes of the coding schema that used to report the analyses in the Results chapter.

#### A. Deriving 1<sup>st</sup> group of codes (for compliance outcomes)

This group is comprised of two primary codes: Full compliance (Fc) and Noncompliance (Nc). These are main codes and their corresponding definition as follows:

Compliance Outcome	Explanation	Example
<b>Full compliance</b>	An obligation is coded as “full compliance” when the Court clearly uses the word "full" or "total." This occurs when States both intend to and do fully comply.	The State has <i>fully complied</i> with the Judgment issued on [...], in accordance with that set forth in Article 68(1) of the American Convention on HR, that obliges the State Parties to the American Convention to comply with the judgments issued by the Court.
<b>Noncompliance</b>	An obligation is coded as “noncompliance” when the Court declares that the State has not responded during the monitoring, no steps have been taken or the State has indicated that it will not comply.	The State is in <i>substantial non-compliance</i> with the measures ordered in the Judgment on preliminary objection, merits, reparations and costs of [...].

Fc and Nc are primary codes that describe the State’s steps related to comply with each obligation imposed. Each obligation was coded for this distinction in both Court monitoring orders and State responses/reports. The Court’s monitoring orders are where the Court’s determination is made explicit.<sup>33</sup> The Court compares the initial deadline for completion (in each Judgment on Reparation and Costs), the type of reparation, how long the State has taken to comply (i.e. length of the monitoring process) to determine compliance outcomes. These codes are extracted from the operative paragraphs of judgment on monitoring.

<sup>33</sup> The number of obligations imposed in a judgment in the cases under study ranged from 2 to 17. While, States rarely comply with all of a judgment’s obligations, they rarely ignore all of the obligations contained in a judgment; States treat each obligation separately.

## B. Deriving 2<sup>nd</sup> group code (for judgment attribute)

This group is comprised of four descriptive codes (judgment attributes): violation, obligation and institution, and high-ranking authorities. They collect descriptive information for all judgments within a case and between cases. Table below illustrates the types of violations that fall under one of the following coded categories: physical integrity rights, political and civil rights, and social, economic and cultural rights.

Type of violation	Corresponding articles of the American convention	Examples of the act of violating code
Physical integrity (subset of political and civil rights)	4, 5, 6, 7-1, 7-2	Torture, extrajudicial executions, enforced disappearances
Political and civil rights (henceforth: PC)	12-16, 18- 20, 22, 23	Deficient condition of detention center for minors
Social, economic and cultural (henceforth: SEC)	26 <sup>34</sup>	N.A.
Justice (subset of PC- include violations of due process and procedure)	7-4, 7-5, 7-6, 7-7, 8- 10, 24, 25	Failure to investigate, prosecute and punish those responsible, arbitrary charging with crimes
Privacy and property (henceforth: PP)	3, 11, 17, 21	Failure to ensure the right to ancestral and other types of property as the return of illegally seized property

The type of violation describes when the Court determined which facts are proved; it decides whether those facts establish a violation of the Convention that is attributable to the State. The violation is extracted from the operative paragraphs of judgment on merits.

In addition to coding violation, this research includes data on the obligation and institution. Obligation<sup>35</sup> and institution together comprise a set of codes that also collect descriptive information for judgments within a case. The table below defines the types of obligation indicating the institution invoked, their corresponding costs and action code, and examples, as follows:

	Definition	Obligations	Costs and Action code	Example
INDIVIDUAL	They require the executive to provide the victims and/or their beneficiaries the economic, social, educational and cultural rights and/or re-establish the civil and political rights violated	Reparations	Capture the financial costs of compliance that the executive is ordered to pay: pecuniary and non-pecuniary damages, costs and expenses, a community fund.	Pay to the victim US \$57,400 The State shall allocate the amount of US\$ 40,000 for a community fund
		Socio-educational	Represents various costs to the executive in mandates that focus on education, health and welfare	Physical, psychological or psychiatric care; Housing, the basic supplies and services; Scholarships or subventions

<sup>34</sup> Social, economic and cultural rights include the right to an education, eradicating illiteracy, language, adequate nutrition and housing and the right of all persons to legal assistance to secure their rights, among others (article 26 in relation to the social, economic and cultural rights in the OAS charter to which it refers). Either by default or by judicial choice, none of my cases involved article 26 claims, even though political and civil rights articles make claims resulting in reparation orders that appear to target social, economic and cultural obligations.

<sup>35</sup> I used the term obligation to distinguish between financial reparations (referred to as “reparations”) and other types of obligations set for in the judgment.



		Symbolic-cultural measures	Capture the symbolic and discursive costs associated with executives being obliged to make a public apology, publish/disseminate judgment and commemorate victims/events. <sup>36</sup>	Construction of a memorial in a street, park or school
		Case-specific changes/ Right being re-established	Capture various costs, as they are “case-specific changes” in which the executive re-establishing civil and political rights for the victims and beneficiaries	Abstention from applying the death penalty
				Reinstating employment or providing alternatives
				Returning the victim to the place of residence or facilitating departure in order
				Annulment of judicial (civil/criminal), administrative, or police records
				Liberation of those detained illegally
				Restitution the property that has been illegally seized or traditional territories
				Annulment of judicial (civil/criminal), administrative, or police records
GENERAL	With the exception of obligations of policy change which require actions by the executive branch), require action beyond the executive to include other actors such as the legislative or judicial branch	Policy changes	Change administrative practices	Training public officials on HR Strengthen mechanism in arrest centers
		Legislative changes	Change laws and procedures	Amend, repeal, or adopt new laws or procedures
		Judicial Accountability	Hold accountable through criminal, administrative & disciplinary prosecution	Investigate the facts, identify, prosecute & punish those responsible for the underlying crimes

Obligations are extracted from the operative paragraphs of Judgment on Reparation and Costs and institutions (with the primary competence to act – executive, legislator and judiciary) from State responses/reports. Obligation and institution were coded separately but combined at a higher level into a single category. They were separate since compliance is explained by the inherent difficulty of the obligation — as opposed to the particular disposition (interest or capacity) of institutions, insofar as the

<sup>36</sup> They are not superficial, conversely, they are suggestive of both the Court’s and the State’s, “ethical-cultural,” alternatives. Initially individual, they disaggregate because they have cultural repercussions to society.

two are distinct. However, they were combined since these two factors often interact such that they jointly influence compliance. Judgments contain two types of obligations: individual and general. Each obligation carries different associated types of costs, which could lead to potentially divergent compliance outcomes. Individual obligations capture financial-intangible costs. General obligations capture policy-making costs. The Court ultimately decides whether a State has complied with a particular mandate.

In expanding the code institution, this research includes data on high-ranking authorities. The corresponding definition as follows:

Explanation	Example
<b>High-ranking authorities are (influential) people in important or powerful positions within a hierarchy. They are also well-connected to other powerful people in networks (e.g. political or military) of protection, domestic security systems and clandestine security organizations that assure impunity.</b>	[...t]hese actions [of extrajudicial executions] happened with <i>consent of the government</i> . Following the killings, justice was denied by civil, military, criminal and administrative courts and [...t]h[e] disappearance [...] was perpetrated by a paramilitary group, which had the support of and close links with <i>senior leaders of the State security forces</i> .” Both had a “special interest in <i>obstructing</i> the investigation into the death of the tradesmen[...]

These high-ranking authorities often are implicated in the international HR process by taking part in acts or decisions that constitute HR violation by which their States are internationally responsible. In these cases, their part in the violation risks being made public in the international HR process thereby damaging their reputation and possibly leading to a loss of their position in the hierarchy and even prosecution by domestic courts. These risks take form when the Court issues a judicial obligation which includes investigation of the violation, holds accountable through criminal, administrative and disciplinary prosecution of those responsible for the underlying crimes and considers the responsibilities of judiciaries or prosecutors that have allowed the violation by functional misconduct and/or location of the remains of victims.

Those that have high-rank military for example fall in this category since military ranks are a system of hierarchical relationships in armed forces. Other examples are high-ranking individuals in the police force, intelligence agencies, or other hierarchical institutions. The Goiburú (Paraguay) case illustrates the participation of high-ranking authorities. In fact, this case brought to light how hundreds of the highest AUTHORITIES were involved in an “alliance of security forces and intelligence services” to commit transborder HR violations. This case is about the torture and subsequent disappearance of Dr. Goiburú (founder of a political party that opposed Stroessner Matiauda) within an action coordinated by the Paraguayan and Argentine security forces as part of Operation Condor that commit transborder crimes against humanity between 1976 and 1983.<sup>37</sup> These crimes were sponsored by the highest authorities<sup>38</sup> such as Argentinian Jorge Videla,<sup>39</sup> the Bolivian Hugo Banzer,<sup>40</sup> the Brazilians Humberto Castello Branco,<sup>41</sup> and Arthur da Costa e Silva,<sup>42</sup> the Chilean Augusto Pinochet,<sup>43</sup> the Paraguayan Alfredo Stroessner and even the Uruguayan Juan Aparicio Mendez and Maria Borderry,<sup>44</sup> including also high AUTHORITIES from Peru, Colombia, Venezuela, and Ecuador. This case brought to judicial light the status of jus cogens of the obligation to investigate, prosecute and punish top-down AUTHORITIES

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<sup>37</sup> Goiburú v. Paraguay (Merits, Reparations and Costs) ICHR, 22 September 2006, Ser. C No. 153, paras. 84 and 89.

<sup>38</sup> Laurence Burgorgue-Larsen & Amaya Úbeda de Torres, “War” in the Jurisprudence of the Inter-American Court of Human Rights, 33 HUMAN RIGHTS QUARTERLY, 157 (2011).

<sup>39</sup> Id. at. 157 (between 1976 and 1983)

<sup>40</sup> id., (between 1971 and 1978)

<sup>41</sup> id., (between 1964 and 1967)

<sup>42</sup> id., (between 1964–1967)

<sup>43</sup> id., (between 1973–1980)

<sup>44</sup> id., (between 1973–1976)

of States responsible for having perpetrated a “systematic” transborder HR violations. The same criteria applied in the Almonacid Arellano (Chile) case.<sup>45</sup>

The presence of high-ranking authorities very often leads to a tactic of cover-up to protect. This tactic of cover-up gradually involves top authorities of the State in complicity (or tacit approval). This is evidenced in that the high-ranking authorities do not take actions to investigate and prosecute those responsible or repeatedly they are hiding incriminating information to protect them. High-ranking authorities are extracted from the Judgment on Merits and State responses/reports. For instance, Colombian authorities act in complicity with active networks of protection to cover-up HR abuses. In these violations, the perpetrators are commonly paramilitaries groups. In Rochela Massacre (Colombia) case a paramilitary group (Los Masetos) was responsible for the extrajudicial execution of 15 Colombian judges who were investigating HR violations. These actions happened with consent of the government. Following the killings, justice was denied by Colombia’s civil, military, criminal and administrative courts. The Court stated in its Judgment on Merits that “[...t]h[e] disappearance [...] was perpetrated by the ACDEGAM paramilitary group, which had the support of and close links with senior leaders of the State security forces.” Both had a “special interest in obstructing the investigation into the death of the tradesmen[,...].” “Los Masetos” as one of the sixteen “covers frequently used by the paramilitary organization [ACDEGAM] to carry out killings and divert investigations” [...in which] “highest commanders took part”). Moreover, in the case Court it was noted that “the disciplinary officials did not investigate the alleged obstruction of the investigation by senior military commanders or

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<sup>45</sup> Almonacid Arellano v. Chile (Merits, Reparations and Costs) ICHR, 26 Sept. 2006, Ser. C No. 154, para. 64

the alleged support provided by police inspectors and other civilian AUTHORITIES to the paramilitary groups [...].<sup>46</sup> This cover-up is recurrently found in cases of Massacres.

### C. Deriving 3<sup>rd</sup> group codes (for State responses)

This group comprises four categories of codes: remedial words and *actions*, authority statements and *actions*. I apply these codes to State responses that are part of the Court proceedings as in the text of the judgment on merits has been established and also integrated State compliance reports in the wording of the judgment. I coded State responses along with Court Statements when the latter provided context for the former. The following are their definitions:

	Explanation	Example
<b>Objecting</b>	It is an authority action in which is coded the State claim against the admissibility of the case or the jurisdiction of the Court.	The State filed a brief containing preliminary objections, and also filed an answer to the application.
<b>Acquiescence</b>	This action was coded under the remedial words category. The code applied to State admissions of violations before the Court. I also selected the following sub-codes: early (i.e. at the first submission or before the Court proceedings has started) (the State accepts after the legally established time frame in which to do so) and later (i.e. after the objection was submitted and rejected or after the dispute phase has started). The acquiescence is coded together with Court praises and State requests and it is analytically separate from compliance.	I wish to state for the record that my country (Guatemala, for instance) accepts and acknowledges its responsibility in the disappearance and death of the victim
<b>Doing noting</b>	This authority action applies to neither object nor acquiesce.	The State expressly waives its right to file preliminary objections regarding the term set forth in [...] Article 51(1) of the American Convention, in the understanding that said extension would have the effect of suspending such term.
<b>Normative commitment</b>	Also coded under the remedial words category. A State response is coded as a normative commitment when the State discourse before the Court indicates positive statements regarding law and HR including accepting certain facts, praising the Court, apologizing or affirming commitment to comply, and discussing steps to improve the HR situation before the issuance of a judgment.	The Court made an “extraordinary contribution to the access to public information and the strengthening of the freedom of expression”
<b>Promising compliance</b>	Coded under remedial words, a statement is coded as promises for compliance when States use phrases declaring or assuming present or future action toward compliance. States leverage promises; however, this	The unjustified delay in the investigation, prosecution, and punishment of those responsible for the facts of the case was accepted to

<sup>46</sup> Rochela Massacre v. Colombia (Merits, Reparations and Costs) ICHR, 11 May 2007, Ser. C No. 163, para. 90-1

	advantage cannot be coded directly.	develop an immediate, impartial, and effective investigation
<b>Requests</b>	Requests are part of a statement of authority category. A State discourse is coded as requests when States seek to frame the litigation by closing the merits phase of the case, restricting the Court hearings, or ceasing the controversy of the facts.	I believe my statement was clear: it accepts responsibility. Consequently, the Court has the right to close the case, file it [...].
<b>Statements</b>	A statement of State is under authority category. A State response is sub-coded: statement of limited responsibility and non-intervention when the State uses a discourse by which the authority of the Court is questioned, critiquing the victim or witnesses, justifying the abuse, or deflecting responsibility on individuals.	The Executive denounces the Convention in light of the obvious usurpation of powers committed by the Court [...]
<b>Anticipatory remedial action</b>	A State action is coded as anticipatory remedial actions when the State commits, in advance of issuance of the judgment on reparation and costs, through bilateral actions like agreements between the State, the victims, the commission; unilateral actions or gestures like voluntary apologies, dissemination of truth.	Symbolic measures, such as apology or dissemination of truth; a specific change, such as release and restitution; policy changes, like improved prison conditions; and legislative change, like voluntary ratification of HR instruments) and friendly agreement
<b>Strategic non-judicial compliance</b>	A remedial action by which is coded the compliance of non-judicial obligations while States deflect attention in their duty to comply with judicial obligations.	The State has complied with the [non-judicial] obligations: to publish, to provide the Inter-institutional Council for the Clarification of Forced Disappearances, to pay. The Court will keep the procedure to monitor compliance open with to investigate the facts that occurred to the victim.
<b>Means of exonerating the guilt and law obstacles</b>	A State action is coded as means of exonerating the guilty of authorities and law obstacles when States submit restrictions and limitations on investigations and prosecutions	The State objected to the lack of jurisdiction of the Court and noted that the facts of the case fell on the amnesties (based on the National Reconciliation Act), secrecy (military reluctance to give information about perpetrators) and delaying procedural tactics.
<b>Non-reporting</b>	A State action is coded as non-reporting when a firm and explicit refusal to accept the authority of the Court is demonstrated by a single or systematic State behavior, stopping obligation to report.	The Court observes the complete absence of State activity to ascertain the whereabouts of [...] promptly. For the Court to be able to monitor effective compliance with this obligation, the State must submit complete detailed and updated information.
<b>Silence</b>	A State action is coded as "silence" when the State is in 'procedural' inaction – the practice of saying or doing nothing when the Court expects something to be said or done. Text that calls for a response is coded after the State actually did not respond. There are two sub-codes of silence: intermittent silence – a periodic break in reporting, a posteriori silence or reduced communicativeness – is a means of hiding information and is related to unresolved issues that the Court has not uncovered. Since it generally comes after insistence by the Court, Commission, and Victims, there is sufficient text for coding. Prolonged silence is a means of imposing noncompliance; the Court perceives it as a highly threatening act of disengagement.	The Inter-American Court does not agree with the reason given by the State for not appearing before this Court and for not participating in the proceedings; as it has been well established in this case, the Court, as with any other international organ with jurisdictional functions, has the inherent authority to determine the scope of its own competence

#### D. Deriving 4<sup>th</sup> group codes (for Court requests)

This group comprises two categories of codes: statements and *actions* of Court. I apply these codes to Court requests that are part of the text document in the judgments on merits, reparations and monitoring, they are defines as follow:

	Explanation	Example
<b>Praising</b>	A court statement is coded as “praising” when the Court offers positive words before the State responses that signal commitment to HR (such as acquiescence, commitment, promising compliance, and anticipatory State remedial action)	Acquiescence is an “important step towards the development of [the] process” and “a positive contribution to the outcome of the [...] case.”
<b>Rewarding</b>	A court action is coded as “rewarding” when the Court destined a series of actions to incentive acquiescence by favoring States with diminished monitoring and enforcement	The Court took note of the acquiescence [...] and decided that the controversy concerning the facts that originated the case has ceased. Additionally, it granted a period of six months to reach an agreement.
<b>Endorsement</b>	A court action is coded as “endorsement” when the Court acts in assisting dispute resolution, enforcing agreements and negotiating with State authorities about the ruling and compliance.	The Court accepts and takes note of the measures [of apology and a voluntarily initiation of investigation] taken by the State on this point.
<b>Demanding Compliance</b>	A statement is coded as “demands for compliance” when the Court uses threatening words, words for control, warning, disestablished reputational consequences representing an aggressive attempt to compel compliance	The acquiescence made by the States should be translated into prompt [...] compliance with the orders of the Court by means of reparation measures. The States should be consistent with the acknowledgment made [...].
<b>Enforcement actions</b>	A Court action is coded as “enforcement actions” when the Court overreaches its jurisdiction, <sup>47</sup> overreaches the quasi judicial-review, and referring the case to another body (e.g., the political and economic bodies of the OAS)	The Court decides [t]o inform the General Assembly of the Organization of American States, in application of Article 65 of the American Convention, about the failure of the State to comply with its obligation to investigate, prosecute and punish all those responsible for the HR violations [...]

#### E. Deriving 5<sup>th</sup> group of codes (for State-Court relationship)

This group is a single relationship code that defines the connection between two codes in the coding scheme (State responses and Court requests). Since NVIVO retains relationships, these relationships can be sequenced to determine their influence, which

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<sup>47</sup> The code includes “jurisdictional overreach”, i.e. straying outside the jurisdictional boundaries pre-established by the Court-mandate or treaty regime. For example: when the Court awards reparations without respecting discursive legal limits, it is overreaches its jurisdiction.

can be diagrammed in visible relationships. In this way, I moved to create the main structure of these relationships to show how State responses impact Court requests and vice versa (impact, i.e., action/reaction/counteraction). I used five categories (as the structure) describing and recording the connection between the request and the response. Requests and responses interconnect to two processes: judicial proceedings and the monitoring processes.

By categorizing this way, responses and requests are organized systematically in ways that can assist the analysis of noncompliance. I can analyze the data from the perspective of each code separately (State responses and Court requests) and in their combination (under impact code). I can also check associations and overlaps by harnessing two of NVIVO software capabilities (matrix coding query and differential output from matrix coding query). It also allows me to filter cases and run a particular query to check/compare everything the codes say about a situation and what those things mean to the others categories.<sup>48</sup>

A purposeful action/reaction/counteraction led by the State or the Court to achieve a goal or deal during the proceedings and monitoring is rooted in influence strategies. Moreover, this code system was able to produce emerging patterns and revealed that it was best to code for particular problems, processes, goals, but also, for strategies. Since these patterns allow for devising strategies in ways to increase the likelihood of compliance and to increase levels of skill at maximizing the potential of some actions and minimizing their limitations. What follow is a definition of these processes and the five stages of the structure of States-Court relationship.

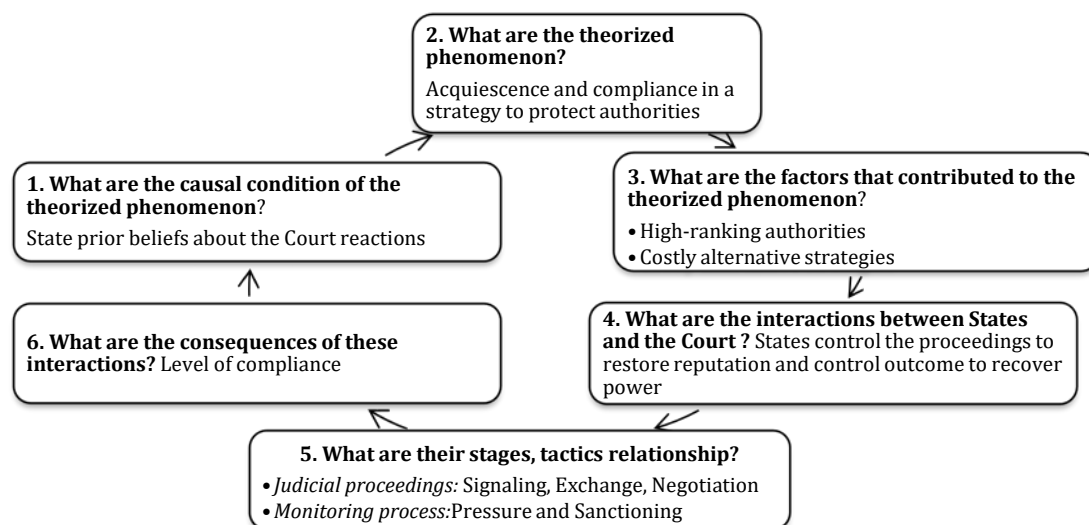
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<sup>48</sup> Janice M Morse, Qualitative methods: The state of the art, 9 QUALITATIVE HEALTH RESEARCH, 3, 393-405 (1999).



Type of processes	Definition
Judicial or the Court proceedings	The legal process by which the Inter-American Court of HR reviews evidence and argumentation, including legal reasoning set forth by opposing parties to reach a decision which determines the State responsibilities, obligations that the State needs to comply and the rights of victims and beneficiaries involved. The proceedings end with the issuance of merit judgments. The opposing parties are the Inter-American on HR Commission, Victims, and their representatives, and third parties against the defendant State.
The monitoring process	The system used by the Inter-American Court of HR to control judgment compliance. The process starts with the notification of the judgment on reparations and costs and ends through the issuance of a monitoring judgment that closes the case by full compliance.
Signaling	Structure State action and Court Reaction At the proceedings, when the Court questions the State's behavior after the violation event, the State can acquiesce to show its commitment with HR and promising future compliance. The Court can accept (totally or partially) or reject the offered acquiescence. If the Court accepts it can praise and reward the State.
Exchange	In the proceedings, the Court can endorse totally or partially the State Requests to frame the litigation
Negotiation	In the course of the proceedings, States persuade the Court to deliver based on State statements and anticipate remedies
Monitoring	The Court reacts to State inaction with demands for compliance to aggressively attempt to compel compliance and uses inspirational request by appealing to State values or ideals. The code is extracted from monitoring judgments
Sanctioning	The Court reacts to noncompliance issues or State inactions with enforcement actions. It is coded based on monitoring judgments

The resulting figure displays the mechanism by which the interaction translates into State interests, goals and outcomes and conditions in which the *process* occurs. It addresses my research concern,<sup>49</sup> and “disentangle(s) the threads” of my analysis.<sup>50</sup>



<sup>49</sup> SUSANNE FRIESE, *QUALITATIVE DATA ANALYSIS WITH ATLAS. TI* 214 (Sage. 2014).

<sup>50</sup> IAN DEY, *QUALITATIVE DATA ANALYSIS: A USER FRIENDLY GUIDE FOR SOCIAL SCIENTISTS* 192 (Routledge. 2003).

***Summary.*** In this chapter, I have provided an overview of the methodological process and a description of the coding scheme that guided the study. While the previous chapter has provided an overview of the scholarship on compliance, the following chapter will address the emerging patterns about judgment compliance.

## **CHAPTER THREE: STATES-COURT INTERACTION: ACCEPTANCE OF RESPONSIBILITY (ACQUIESCENCE) IN STATE STRATEGY**

### **I. INTRODUCTION**

This Chapter presents the results and analysis of the interaction between the States and the Court during the judicial proceedings and monitoring process, particularly as it relates to patterns of (non) acquiescence and judgment (non) compliance. Article 62 of the Rules of Procedure grants States the right to accept international responsibility, i.e. to acquiesce.<sup>1</sup> Such acquiescence is recorded in the Judgments on Merits, Reparations and Costs, and in the Court's Annual Reports.<sup>2</sup> Intuitively, it seems unlikely that a State would refuse or resist compliance with a judgment after accepting international responsibility for the events in question. Indeed, Manuel Ventura Robles claims that acquiescence constitutes a sign toward national consolidation of respect for HR in his work, entitled "The Discontinuance and Acceptance of claims in the jurisprudence of the ICHR."<sup>3</sup> Accordingly, acquiescence is considered a sign of commitment to HR. Therefore, one would expect that States that acquiesce would be more likely to comply

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<sup>1</sup> Note that current Rules of Procedure of The Inter-American Court of HR, Art. 62, January 1, 2010 was approved by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28, 2009. [hereafter Rules of Procedure] ("If the respondent informs the Court of its acceptance of the facts or its total or partial acquiescence to the claims stated in the presentation of the case or the brief submitted by the alleged victims or their representatives, the Court shall decide, having heard the opinions of all those participating in the proceedings and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule upon its juridical effects.") (These Rules of Procedure entered into force on January 1, 2010).

<sup>2</sup> Annual Report 2010, at 9-13, 81-6, this report, the decisions and other Court documents are available at this web site: <<http://www.corteidh.or.cr>>. The following figures are calculated on the basis of data from different Court Annual Reports. The 2010 Report states that, of the 129 cases ruled as of the end of 2010, 111 are being monitored. Therefore, only 18 cases are not under monitoring and only seven of those have been declared in full compliance with the judgment as of 2010.

<sup>3</sup> Manuel Ventura Robles, Discontinuance and Acceptance of Claims in the Jurisprudence of the Inter-American Court of Human Rights, The, 5 ILSA J. INT'L & COMP. L., 619 (1998).

than States that do not. Furthermore, Ventura Robles claims that acquiescence indicates that the Court and the system will not be subjected “to a long and difficult process.”<sup>4</sup>

Contrary to these expectations, my results reveal that acquiescence does not increase the probability of compliance nor does it lead to a shorter and easier monitoring process. Rather compliance rates are lower and compliance times longer when States acquiesce than when they do not. More paradoxically, the data shows that acquiescence is frequently associated with Court judgments that would implicate powerful and high-ranking authorities (henceforth: AUTHORITIES). The compliance rate is even lower if we expand the scope slightly to all cases involving AUTHORITIES.

As pointed out in Chapter 1, existing theories on State interests (as in IR theories) and norms (as in IL theories), does not adequately explain patterns resulting from the interaction between the States and the Courts. Existing theories are concerned with compliance with norms, not judgments, and these show different patterns: mostly compliance with norms; mostly noncompliance with judgments. Moreover, the theories do not systematically consider a role for the Courts in the interaction. As a result, it is not exactly that these theories do not explain rather that they do not even try to explain patterns resulting from the interaction between States and Courts. Thus, we need a theory of compliance with judgments that considers the role that the Courts can play in this interaction.

I will argue that this interaction provides the missing key to explain the complex and unexpected relationship between acquiescence and compliance. My analysis of the data reveals that this interaction is partially the result of incompatible State and Court goals for the resolution of the case. States choose a pragmatic approach to compliance.

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<sup>4</sup> Id. at.

They seek to avoid suffering consequences, particularly in cases involving violations of AUTHORITIES. In contrast, the Court manifests itself idealistically. It seeks to promote deep commitments to HR. An integral part of this goal is obtaining prosecutions for HR violators domestic to eliminate impunity and ensure the victim's rights to truth and reconciliation. Therefore, in cases where the violators are AUTHORITIES, the Court and the States have incompatible goals.

As also discussed in Chapter 1, Courts have different roles that require the exercise of different powers. Amid a bundle of powers, the Court interprets the submissions and identifies the issues(s) and object(s) of the claim in the case; determines its competence to hear a particular matter; and decides all issues concerning the exercise of its jurisdiction. Consequently, Courts have more power than States in influencing and directing judicial proceedings.

States attempt to control the Court proceedings and outcome either by retaining or by recovering areas of *power* they believe legitimately theirs.<sup>5</sup> I propose that we can understand the surprising preliminary finding that acquiescence leads to lower compliance rates by analyzing acquiescence as a first step in a series actions (promises, requests, proclamations of limited responsibility and assertions against Court intervention, anticipatory remedial actions, compliance with non-judicial obligations, restrictions and limitations on investigations and prosecutions and non-reporting)

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<sup>5</sup> The Court uses its non-decision making power when it requires the participation of States to make or implement a decision and excludes unwanted, impossible or unlikely outcomes in favor of States. Alternatively, States need to convince the Court that a particular path is best or most convenient that its decision-making power. There are also two dimension of power. Symbolic power by managing understandings, actors (States or the Court) create a condition where others make a preferred decision or take a desired course of action without any direct application of decision-making power. And, the power of the system that means that the nature of the system, not the actor's planned activity, has a profound effect on the ability of States to have differential (contextual and temporal) resources.

designed to minimize consequences for AUTHORITIES of being threatened by an International Court decision. Nevertheless, for fear it would betray its idealistic goal (commitment to HR), often the ICHR frustrates State efforts to direct the outcomes, refuses to settle for bland or restrained judgments, and continues the issuance of judgments that require actions against AUTHORITIES. In such cases, States, in view of their goals of protecting AUTHORITIES, either fail to comply or enter long enforcement monitoring processes.

The remainder of this Chapter consists of two sections. Part II shows the main quantitative results relating acquiescence and compliance. Part III discusses the results of the qualitative analysis illustrated in figure B.

## **II. ACQUIESCENCE AND JUDGMENT COMPLIANCE: STATES AND COURTS**

Part II reports quantitative data to furnish an overview of how States and the Court view the relationship between acquiescence and judgment compliance.

Starting with the Court, the compliance data analyzed in this dissertation demonstrates that the Court does indeed view acquiescence of responsibility, as Ventura Robles remarked, as a signal or promise of “prompt and effective” compliance.<sup>6</sup> Indeed, in 75% of the cases with acquiescence, the Court repeatedly praises the act of acquiescence calling it a positive contribution to the case in particular and to the Inter-American HR System in general.<sup>7</sup>

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<sup>6</sup> *Montero Aranguren v. Venezuela* (Monitoring) ICHR, 30 August 2011, para. 7.

<sup>7</sup> *Bueno Alves v. Argentina* (Merits, Reparations and Costs) ICHR, 11 May 2007, Ser. C No. 164 paras. 30-34; *Bulacio v. Argentina* (Merits, Reparations and Costs) ICHR, 18 September 2003, Ser. C No. 100 para. 37; *Kimel v. Argentina* (Merits, Reparations and Costs) ICHR, 2 May 2008, Ser. C No. 177, paras.

The results also reveal that, during monitoring, the Court gives States that acquiesce more time to act without intervention, delaying control processes and monitoring less frequently. First, the Court issues its first monitoring judgment to States

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25-40; *Ticona Estrada v. Bolivia* (Merits, Reparations and Costs) ICHR, 27 November 2008, Ser. C No. 191 para. 26; *Ibsen Cardenas and Ibsen Peña v. Bolivia* (Merits, Reparations and Costs) ICHR, 1 September 2010, Ser. C No. 217, para. 37; *Trujillo Oroza v. Bolivia* (Merits) ICHR, 26 January 2000, Ser. C No. 64 para 42; *Ximenes Lopes v. Brazil* (Merits, Reparations and Costs) ICHR, 4 July 2006, Ser. C No. 149, para 80-119; *Rochela Massacre v. Colombia* (Merits, Reparations and Costs) ICHR, 11 May 2007, Ser. C No. 163 para. 29; *Valle Jaramillo v. Colombia* (Merits, Reparations and Costs) ICHR, 27 November 2008, Ser. C No. 192 paras. 46, 167, 231; *Escué Zapata v. Colombia* (Merits, Reparations and Costs) ICHR 4 July 2007, Ser. C No. 165 para. 20; *Las Palmeras v. Colombia* (Reparations and Costs) ICHR, 26 November 2002, Ser. C No. 96, para. 74; *Mapiripán Massacre v. Colombia* (Merits, Reparations and Costs) ICHR, 15 September 2005, Ser. C No. 134, paras. 184, 208, 248; *Gutiérrez Soler v. Colombia* (Merits, Reparations and Costs) ICHR, 12 September 2005, Ser. C No. 132, para. 106-59; *Ituango Massacre v. Colombia* (Objection, Merits, Reparations and Costs) 1 July 2006, Ser. C No. 148 para. 79; *Manuel Cepeda Vargas v. Colombia* (Objections, Merits, Reparations, and Costs) ICHR, 26 May 2010, Ser. C, No. 213, para. 18; *Zambrano Velez v. Ecuador* (Merits, Reparations and Costs) ICHR, 4 July 2007 Ser. C No. 166, para. 10 and 30; *Albán Cornejo v. Ecuador* (Merits, Reparations and Costs) ICHR, 26 September 2006, Ser. C No. 171, para. 24; *Benavides-Cevallos v. Ecuador* (Merits, Reparations and Costs) ICHR, 19 June 1998, Ser. C No. 38, para. 57; *Chaparro Alvarez and Lapo Ñiguez v. Ecuador* (Objections, Merits, Reparations and Costs) ICHR, 21 November 2000, Ser. C No. 170, para. 33; *The Plan Sanchez Massacre. v. Guatemala* (Merits) ICHR, 29 April 2004, Ser. C No. 105, para. 50; *Molina-Theissen v. Guatemala* (Merits) ICHR, 4 May 2004, Ser. C No. 106, para. 46; *Carpio Nicolle v. Guatemala* (Merits, Reparations and Costs) ICHR, 22 November 2004, Ser. C No. 117, para. 84; *Myrna Mack Chang v. Guatemala* (Merits, Reparations and Costs) ICHR, 25 November 2003, Ser. C No. 101, para. 10; *Tiu Tojín v. Guatemala* (Merits, Reparations and Costs) ICHR, 26 November 2008, Ser. C No. 190, para. 22; *“Las Dos Erres” Massacre v. Guatemala* (Objection, Merits, Reparations and Costs) ICHR, 24 November 2009, Ser. C No. 211, para 38; *Chitay Nech v. Guatemala* (Objections, Merits, Reparations and Costs) ICHR, 25 May 2010, Ser. C No. 212, paras. 21, 248; *Kawas Fernández v. Honduras* (Merits, Reparations and Costs) ICHR, 3 April 2009, Ser. C No. 196, paras. 32-202; *Servellón García v. Honduras* (Merits, Reparations and Costs) ICHR, 21 September 2006, Ser. C No. 152, para. 77; *González. (“Cotton Field”) v. Mexico* (Objections, Merits, Reparations and Costs) ICHR, 16 November 2009, Ser. C No. 205, para. 26; *Fernández Ortega v. Mexico* (Objection, Merits, Reparations, and Costs) ICHR, 30 August 2010, Ser. C No. 215, paras. 25, 244; *Rosendo Cantú v. Mexico* (Objections, Merits, Reparations, and Costs), ICHR, 31 August 2010, Ser. C No. 216, para. 22; *Velez Llor v. Panama* (Objections, Merits, Reparations, and Costs), ICHR, 23 November 2010, Ser. C No. 218, para. 60; *Juvenile Reeducation Institute v. Paraguay* (Objections, Merits, Reparations and Costs) ICHR, 2 September 2004, Ser. C No. 112, para. 265; *Goiburú. v. Paraguay* (Merits, Reparations and Costs) ICHR, 22 September 2006, Ser. C No. 153 para. 52; *Vargas-Areco. v. Paraguay* (Merits, Reparations and Costs) ICHR, 26 September 2006, Ser. C No. 155, paras. 65-134; *García Asto and Ramírez Rojas v. Peru* (Objection, Merits, Reparations, and Costs) ICHR, 25 November 2005, Ser. C No. 137, para. 60; *La Cantuta. v. Peru* (Merits, Reparations and Costs) ICHR, 29 November 2006, Ser. C No. 162, para. 56; *Baldeón García v. Peru* (Merits, Reparations and Costs) ICHR, 6 April 2006, Ser. C No. 147, paras. 55, 76, 115; *Barrios Altos v. Peru* (Merits) ICHR, 14 March 2001, Ser. C No. 75, para. 40; *Huilca Tecse v. Peru* (Merits, Reparations and Costs) ICHR, 3 March 2005, Ser. C No. 121, para. 84; *Miguel Castro Castro Prison. v. Peru* (Merits, Reparations and Costs) ICHR, 25 November 2006, Ser. C No. 160, paras. 148, 198, 267; *Montero Aranguren . (Detention Center of Catia) v. Venezuela* (Objection, Merits, Reparations and Costs) 5 July 2006, Ser. C No. 150, para 57 and 61; *The Caracazo v. Venezuela* (Merits) ICHR, 11 November 1999, Ser. C No. 58, para.43; and *Blanco Romero v. Venezuela* (Merits, Reparations and Costs) ICHR, 28 November 2005, Ser. C No. 138, para. 64 and 100.

that have acquiesced at thirty nine months on average from the issuance date for the Judgment on Reparations and Costs,<sup>8</sup> instead of twenty one months on average for States that have not.<sup>9</sup> Second, monitoring judgments are issued every thirty on average for States that have acquiesced,<sup>10</sup> instead of eighteen months on average for States that have not.<sup>11</sup> This frequency affects the ultimate number of judgment monitoring occurrences: three monitoring judgments on average for States that have acquiesced<sup>12</sup> and five on average for States that have not.<sup>13</sup>

It is clear that acquiescence is not necessary for compliance. Indeed, out of the 129 cases studied for this dissertation,<sup>14</sup> the 7 cases that have fully complied with all obligations to date did not involve acquiescence.<sup>15</sup> In these cases, there was no

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<sup>8</sup> These cases with acquiescence have a standard deviation of 1.5 years. See the pattern in Garrido and Baigorria v. Argentina (Merits) ICHR, 2 February 1996, Ser. C No. 25; Caballero Delgado and Santana v. Colombia (Merits) ICHR, 8 December 1995, Ser. C No. 22; Benavides-Cevallos, *supra* 7; Blake v. Guatemala (Merits) ICHR, 24 January 1998, Ser. C No. 36; Tiu Tojín, *supra* 7; El Amparo v. Venezuela (Merits) ICHR, 18 January 1995, Ser. C No. 19; Blanco Romero, *supra* 7.

<sup>9</sup> These cases without acquiescence have a standard deviation of 0.75 years. See the pattern in Baena Ricardo. v. Panama (Merits, Reparations and Costs) ICHR, 02 February 2002, Ser. C No. 72; Sawhoyamaxa Indigenous Community v. Paraguay (Merits, Reparations and Costs) ICHR, 29 March 2006, Ser. C No. 146; Durand. v. Perú (Merits) ICHR, 16 August 2000, Ser. C No. 68; Serrano-Cruz sisters v. El Salvador (Merits, Reparations and Costs) ICHR, 01 March 2005, Ser. C No. 120; Hilaire, Constantine and Benjamin. v. Trinidad and Tobago (Merits, Reparations and Costs) ICHR, 21 June 2002, Ser. C No. 94; Apitz Barbera (“First Court of Administrative Disputes”) v. Venezuela (Objection, Merits, Reparations and Costs) ICHR, 5 August 2008 Ser. C No. 182.

<sup>10</sup> These cases with acquiescence have a standard deviation of 1.08 years. See the pattern in Garrido and Baigorria, *supra* 8; Caballero Delgado and Santana, *supra* 8; Tiu Tojín, *supra* 7; Amparo, *supra* 8; Benavides-Cevallos, *supra* 7.

<sup>11</sup> These cases without acquiescence have a standard deviation of 1.5 years. See the pattern in Palamara-Iribarne. v. Chile (Merits, Reparations and Costs) ICHR, 22 November 2005, Ser. C No. 135; Moiwana Community v. Suriname (Objections, Merits, Reparations and Costs) ICHR, 15 June 2005, Ser. C No. 124; Hilaire, Constantine and Benjamin, *supra* 9; Cantoral Benavides v. Perú (Merits) ICHR, 18 August 2000, Ser. C No. 69; Serrano-Cruz sisters, *supra* 9; Baena Ricardo, *supra* 9; Sawhoyamaxa Indigenous Community, *supra* 9; Juvenile Reeducation Institute, *supra* 7; Apitz Barbera, *supra* 9.

<sup>12</sup> These cases with acquiescence have a standard deviation of 1.1, see the pattern in Garrido and Baigorria, *supra* 8; Ximenes Lopes, *supra* 7; Benavides-Cevallos, *supra* 7; Tiu Tojín, *supra* 7; Baldeón-García, *supra* 7; Aranguren, *supra* 7.

<sup>13</sup> These cases without acquiescence have a standard deviation of 1.8. See the pattern in Baena Ricardo, *supra* 9; Cantoral Benavides, *supra* 7.

<sup>14</sup> *Id.*, *supra* 20

<sup>15</sup> The following are the Court orders to close the 7 cases for full compliance: The Last Temptation of Christ v. Chile by order dated November 28, 2003 as recorded in the 2003 Annual at 42; Acosta



acquiescence and the Court began to monitor States early (within two years on average) and frequently, issuing monitoring judgments approximately every year on average.<sup>16</sup>

Furthermore, the data demonstrates that acquiescence does not increase the probability of compliance; in fact, it seems to decrease it. The compliance rate for obligations that do not involve acquiescence is 50% while the compliance rate for obligations that involve acquiescence is only 20%.<sup>17</sup>

Acquiescence also does not improve compliance *times*. I compared compliance times for fulfilled obligations based on acquiescence. Obligations that do not involve acquiescence took less than 24 months to reach full compliance.<sup>18</sup> By contrast, those obligations in which there was acquiescence took more than 45 months, on average, to reach full compliance.<sup>19</sup>

Looking more closely at the cases with acquiescence, 78.5% of these involve AUTHORITIES - only 22.5% of cases without acquiescence involve AUTHORITIES. Further, the 7 cases that have complied corroborate the pattern. None of these accepted

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Calderon v. Ecuador by order dated February 7, 2008 as recorded in the 2008 Annual at 13; 'o by order dated August 6, 2008 as recorded in the 2008 Annual at 13; Claude Reyes v. Chile by order dated November 24, 2008 as recorded in the 2008 Annual at 28; Mayagna Awas Tingni Community v. Nicaragua by order dated April 3, 2009 as recorded in the 2009 Annual at 65; Tristan Donoso v. Panama by Order dated September 1, 2010 as recorded in the 2010 Annual at 43; Herrera Ulloa v. Costa Rica by Order dated November 22, 2010 as recorded in the 2010 Annual at 46.

<sup>16</sup> Id.

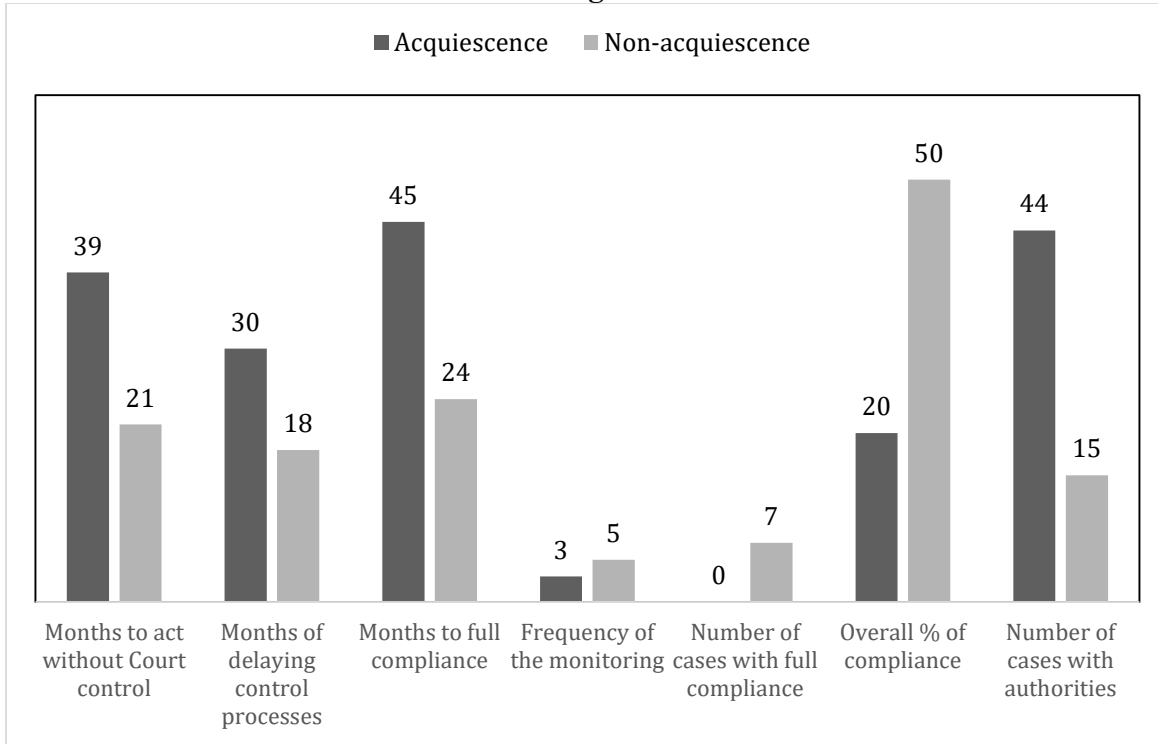
<sup>17</sup> For obligations reported on the cases that are under the monitoring process (118 cases), 159 of 313 obligations do not involve acquiescence and were complied (they have a compliance rate of 50%), while contrary to rationality, of 418 obligations involving acquiescence 90 were complied (they have a compliance rate of 21%).

<sup>18</sup> I drew a comparison for fulfilled obligations based on acquiescence. I calculated the compliance times by obligations as of the issuance date for the Judgment on Reparations and Costs through the Court monitoring-judgment to close each obligation for compliance.

<sup>19</sup> Using 1996 as an example: two judgments were issued; in only one case, the judgment notes the Court's recognition of the State's acquiescence. Obligations that do not involve acquiescence took 25 months to be complied with. Rather, those obligations in which there was acquiescence took more than 109 months to be complied with. I compared, for instance, Neira Alegria (Peru) and Amparo (Venezuela) cases.

responsibility and no AUTHORITIES were involved.<sup>20</sup> Data on presented main findings is restated in Figure A.

**Figure A.**



The data strongly points to the conclusion that the Court assumes a connection between acquiescence and compliance. And, States, quite contrary to the Court, do not connect acquiescence to a commitment to comply, and use it to their advantage, especially in cases where AUTHORITIES are exposed to reputational damage and, even worse, criminal prosecution.

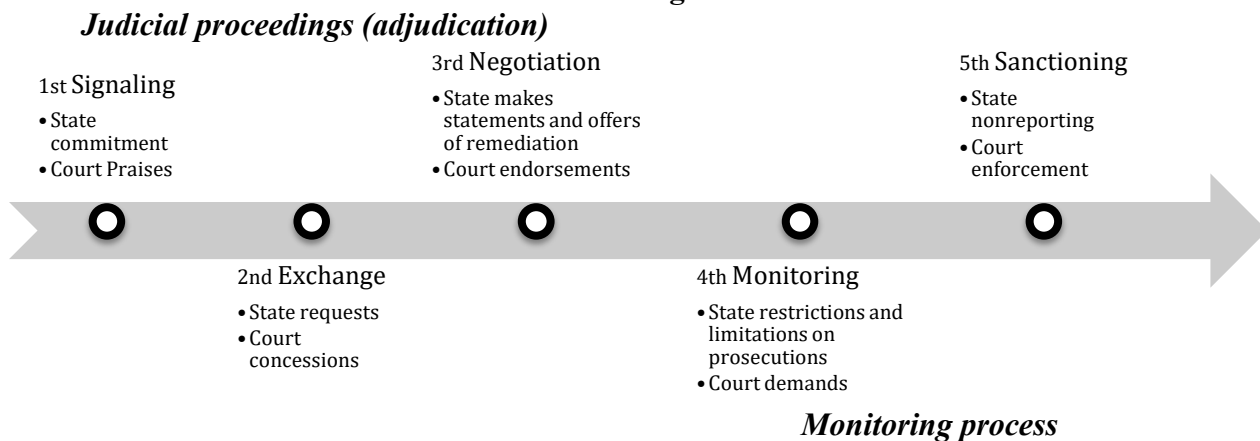
<sup>20</sup> Id.15

### III. ACQUIESCENCE AND JUDGMENT COMPLIANCE IN A STRATEGY TO PROTECT AUTHORITIES

It is my claim in this dissertation that the different behaviors of the Court and States presented above reflect two goals that are not always compatible in the case resolution. On the one end, an idealist Court (by which I mean the Inter-American Court of HR, hereafter the Court or ICHR) views acquiescence normatively as a commitment to HR. On the other end, pragmatic States use acquiescence instrumentally to exercise power in order to protect authorities. In this section, I therefore, present the qualitative evidence for my claim, particularly as it relates to patterns of behavior/actions that relate to the protection of AUTHORITIES. Following the coding system presented in Chapter 2, the interaction between the States and the Court can be divided into five stages: signaling, exchange, negotiation, monitoring, and sanctioning.

This pattern of interaction is summarized in Figure B below showing the substantive structure of the relationship between (non)acquiescence and judgment (non)compliance and its five stages.

**Figure B.**



\*Please bear in mind that this dissertation counts with Appendix C. In this appendix, I created a map of possible State positions and Court actions developed during the Court proceedings and monitoring processes - these activities are analyzed in the following subsections.

### **A. Stage 1. Signaling**

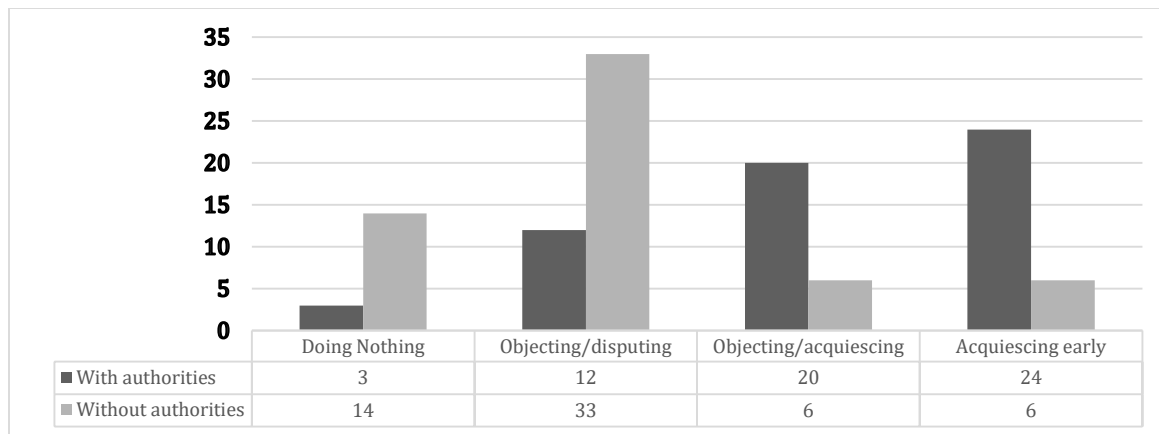
Once the case is brought before the Court by the application filed by the Commission, States are publicly connected to HR violations, damaging their reputation and exposing them to criticism, even before a judgment by the Court. The actions that States can take at the beginning of the judicial proceedings have the potential of restoring their reputation including their authorities' reputation since they signal to international and domestic forums their commitments to HR. However, the threat to AUTHORITIES – a necessary piece for understanding my analysis – narrows the choice of actions. There are three actions that States can take at this stage: do nothing (neither acquiesce nor object), object, or acquiesce.

In cases where AUTHORITIES are threatened by Court judgments ordering domestic prosecutions, acquiescence is a preferred alternative over doing nothing. This is since States can anticipate that the Court's reaction to acquiescence will be positive and use acquiescence (either in lieu of or after the submission of preliminary objections) at the signaling stage to create the perception that their subsequent actions are acceptable and legitimate. The evidence is conclusive in the State decisions. In the case that States judge the evidence about their international responsibility as disputable, objecting will be the tendency rather than doing nothing. Figure C shows the results for these States positions (see below).

## 1. Doing Nothing

States can do nothing (neither object nor acquiesce) at the beginning of the Court proceedings. These States do not object since there are no means/grounds to file an objection. While, States do not acquiesce since there are AUTHORITIES implicated. Doing nothing puts the State into a risk of its reputation as an actor of the International System since the Court can take its international responsibility for granted. Gaining praises by complying with the Court judgments controls this reputational risk. The data showed that States that do nothing complied more than those States that have acquiesced or objected. In fact, the compliance rate of cases where States do nothing is 63.8%.

**Figure C.**



N=118.<sup>21</sup> The number here is given for each action and reflects its proportion on the sample. The table also expressed the cases or a particular action grouped under the absence or presence of AUTHORITIES.

States did not object since they could not meet the Court's requirements to object.

The Convention grants the Court jurisdiction to consider procedural requirements to admit or reject preliminary objections.<sup>22</sup> States seem to have learned from rejections that

<sup>21</sup> See Appendix A for further details about the cases.

<sup>22</sup> As of the 90s, the Court exercised its jurisdiction to not allow the State to submit an additional brief that expanded the scope of its objections in *Cayara. v. Peru* (Objections) ICHR, 3 February 1993, Ser. C No. 14 paras. 13, 60-3. At the end of the 90s, it makes clear that the Court will deny State's request for an extension to submit objection late even when the Court granted the State extra time to file its answer in *Benavides-Cevallos*, supra 7. See similar details in *Tibi v. Ecuador* (Objections, Merits,

they cannot submit impertinent objections that look to be an abusive use of the right of a petition (according to article 42.2. of the Rules of the Court).<sup>23</sup> Thus, States do nothing at the beginning of the proceedings when they do not have means to substantiate and support objections.<sup>24</sup> By doing so, States waive the procedure of objections established in their benefits, and they cannot interpose later objections.<sup>25</sup> There are 17 cases in which States did nothing; only three have authorities. Out of the 14 that do have authorities, there are 4 cases in which States were unable to meet the Court's admissibility requirements. In these instances, States failed to raise objections on time, so the Court granted an additional period for States to file their answers to the application. Among these cases, the Court denied the State's request for an extension to submit preliminary objections<sup>26</sup> or for an expansion of the scope of their answers to try to include objections.<sup>27</sup> In the other 2 cases, States were unable to object since they denounced the Court jurisdiction.<sup>28</sup>

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Reparations, and Costs) ICHR, 7 September 2004, Ser. C No. 114, para. 47; 19 *Tradesmen. v. Colombia*, (Objections, Merits, Reparations, and Costs) ICHR, 5 July 2002, Ser. C No. 93, para. 27; *Herrera-Ulloa v. Costa Rica*, (Objections, Merits, Reparations, and Costs) ICHR, 2 July 2004, Ser. C No. 107, para. 46; and *Juan Humberto Sanchez*, supra 29, para. 65.

<sup>23</sup> Rules of Procedure, Art. 42.2, ("The document setting out objections shall contain the facts on which the objections are based, legal arguments and conclusions, and supporting documents, as well as any evidence to be offered").

<sup>24</sup> *Id.*

<sup>25</sup> *Neira Alegria. v. Peru* (Objections) ICHR, 11 December 1991, Ser. C No 13, paras. 28; *Castillo Petruzzi. v. Peru* (Objections) ICHR, 4 September 1998, Ser. C No. 41, paras. 56-7; *Loayza Tamayo v. Peru* (Objections) ICHR, 31 January 1996, Ser. C No 33, paras. 41-3; *Castillo Páez*, supra 26 paras. 41-3; *Mayagna (sumo) Awas Tingni Community v. Nicaragua* (Objections), ICHR, 1 February 2000, Ser. C No 67, para.5.

<sup>26</sup> *Fermín Ramírez. v. Guatemala* (Merits, Reparations, and Costs) ICHR, 20 June 2005, Ser. C No. 126, paras. 15, 18-19 and 20; *Raxcacó Reyes. v. Guatemala* (Merits, Reparations, and Costs) ICHR, 15 September 2005, Ser. C No. 133, paras. 10, 12, 14, 17-19; *Yvon Neptune. v. Haiti* (Merits, Reparations, and Costs) ICHR, 6 May 2008, Ser. C No. 180, para 4.

<sup>27</sup> See the pattern in *Barreto Leiva. v. Venezuela* (Merits, Reparations, and Costs) ICHR, 17 November 2009, Ser. C No. 206, para. 25 ("[... the Tribunal considers that this type of arguments [none of the defendants and later on, convicted people alleged [any] violation of the Rule of Law during the proceedings] should have been previously put forward, at the appropriate procedural time of the processing of admissibility before the Inter-American Commission and after, if applicable, as an

In 8 others still, States did not acquiesce despite the actual evidence since there were no authorities implicated. The costs associated with doing nothing – will depend on whether there are authorities involved in a case. When there are not authorities concerned, the States are not restricted by an emphasis on political priorities (such as protecting authorities) other than HR. Indeed, States made a statement renouncing their right to put into question the Court jurisdiction.<sup>29</sup> Moreover, the compliance rate of cases where States do nothing is 63.8%.<sup>30</sup> Thus, through a tacit admission of culpability and high compliance, States restore their reputation by gaining praise from the Court and availing themselves of press reports of their HR – friendly acquiescence - and minimize on-going criticism.

By doing nothing, the Court would widely take for granted the responsibility of the State in HR violations. Thereby, the Court would perceive in doing nothing a true or real culpability without assessing the evidence. Since, without objection or acquiescence, the Court can potentially give this treatment to AUTHORITIES, therefore, doing nothing

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objection before the Court. In view of the fact that this is not what happened, the Tribunal dismisses these allegations.")

<sup>28</sup> *Caesar. v. Trinidad and Tobago (Merits, Reparations, and Costs)* ICHR, 11 March 2005, Ser. C No. 123, para. 6 ("On May 26, 1998, Trinidad and Tobago denounced the Convention and the denunciation became effective one year later, as of May 26, 1999, pursuant to Article 78 of the Convention. According to Article 78 of the Convention, a denunciation will not release the denouncing State from its obligations under the Convention with respect to acts of that State occurring prior to the effective date of the denunciation that may constitute a violation of the Convention."). For further detail, see paras.22, 24 and 34.

<sup>29</sup> *Palamara-Iribarne*, supra 11, para. 12 (expressly waives).

<sup>30</sup> *Palamara-Iribarne*, Id.; *Claude Reyes v Chile (Merits, Reparations, and Costs)* ICHR, 19 September 2006, Ser. C No.151; *The Last Temptation of Christ (Olmedo-Bustos) v. Chile (Merits, Reparations, and Costs)* ICHR, 5 February 2001, Ser. C No.73; *Suárez Rosero. v. Ecuador (Merits)* ICHR, 12 November 1997, Ser. C No.35; *Acosta Calderon. v. Ecuador (Merits, Reparations, and Costs)* ICHR, 24 June 2005, Ser. C No.129; *López Álvarez. v. Honduras (Merits, Reparations, and Costs)* ICHR, 1 February 2006, Ser. C No.141; *Ricardo Canese. v. Paraguay (Merits, Reparations, and Costs)* ICHR, 31 August 2004, Ser. C No.111; *The Yakye Axa v. Paraguay (Merits, Reparations, and Costs)* ICHR, 17 June 2005, Ser. C No.125; *De la Cruz-Flores. v. Peru (Merits, Reparations, and Costs)* ICHR, 18 November 2004, Ser. C No. 115; *Gómez-Paquiyaury. v. Peru (Merits, Reparations, and Costs)* ICHR, 8 July 2004, Ser. C No. 110.

is costlier than the other two strategies. Only 2 cases in which States did nothing involved authorities.

## **2. Objecting**

The option to interpose preliminary objections has a significant role in the defense of the State. Refuge (or not) in mere technicality, objections are the first line of defense to inhibit the Court from examining the merits of the case or particular claims/aspects of a case, moreover, they may result in the dismissal of an otherwise accusatory evidence. States do not make a tacit admission of responsibility (i.e., doing nothing) when they have enough evidence to retain the possibility to dispute the facts and claims of the application. States do not acquiesce because the abuse is quickly remembered in the rapid succession and publicity of the process. Furthermore, these objections also allow delaying the considerations of cases. States recognize that this lapse of time improves their defense, softens the abuse and helps to obliterate its recollection. In this view, objecting also would assist in the process of restoring the name of the State and its AUTHORITIES. Thus, States object if there is disputable/distortable evidence for alleged actions or omissions against authorities or institutions of the State and if there is proof but it is to people or a group in their condition of individuals (at least, initially). In fact, in 72 out of 118 cases, States begin the proceedings with objections (more details of data below).

If the Court admits State objections that go to the overall admissibility of the case or the jurisdiction of the Court, States would acquire an effective control of the outcomes. The Court is tasked with determining its jurisdiction or applying the rules of



admissibility.<sup>31</sup> The ICHR is well known as “the clearest example of a Court where noncompliance is the norm.”<sup>32</sup> Consequently, the Court would be able to free itself from cases that would have a high probability of ending in noncompliance if it admitted the objection – i.e. gave up jurisdiction or found the case inadmissible if the Court decides it has jurisdiction. The Court would be acting pragmatically in these cases. The data shows, however, that the Court acts idealistically by rejecting 60% of objections submitted completely.<sup>33</sup> The remaining 40% were partially rejected (15%), withdrawn from the States (15%) before they were ruled and admitted by the Court (10%). However, in only 3% out of those admitted the Court shelved the case.<sup>34</sup> Consequently, nearly *all* cases (97%) with preliminary objections continued to the merits phase, followed by a reparations stage and subsequent monitoring.<sup>35</sup>

The rejection rate of objections makes it paradoxical that States insist on interposing objections. However, even if the Court eventually denies the objection, the filing of objections can have two other positive outcomes: it protects the reputation of AUTHORITIES and it postpones the merits phase by extensions of deadlines and

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<sup>31</sup> Castañeda Gutman. v. México (Objections, Merits, Reparations, and Costs) ICHR, 6 August 2008, Ser. C No. 184, para. 39; Cabrera García and Montiel-Flores. v. Mexico (Objection, Merits, Reparations, and Costs) ICHR, 26 November 2010, Ser. C No. 220, para.17; Bayarri. v. Argentina (Objection, Merits, Reparations and Costs) ICHR, 30 October 2008, Ser. C No. 187, para. 19; Tristán Donoso v. Panama (Objection, Merits, Reparations and Costs) ICHR, 27 January 2009, Ser. C No. 193, para.15; Escher v. Brazil (Objections, Merits, Reparations, and Costs) ICHR, 6 July 2009, Ser. C No. 200, para 15; Garibaldi v. Brazil (Objections, Merits, Reparations, and Costs) ICHR, 23 September 2009, Ser. C No. 203, para. 17.

<sup>32</sup> DOTHAN, Reputation and Judicial Tactics: A Theory of National and International Courts 272. 2014.

<sup>33</sup> This percentage includes all objections. Out of 129 cases, there are 80 objections.

<sup>34</sup> Cayara v. Peru (Objections) ICHR, 3 February 1993 as recorded in the 1993 Annual Report at 25; Maqueda v. Argentina (Objections) ICHR, 17 January 1995 as included in 1995 Annual Report at 31; Alfonso Martín del Campo Dobb v. Mexico (Objections) ICHR, 3 September 2004 included in 2004 Annual Report at 8.

<sup>35</sup> According to my data the Court rejects 48 objections submitted, partially accepts 12, admits 8, and 12 state withdrawals.

excused delayed submissions.<sup>36</sup> During the merits, the Court discerns the truth of the alleged facts and controversial claims supported by the evidence to determine the State responsibility.<sup>37</sup> Considering that there are not significant signs of liability against States, the delay may result in a reduction of the zeal of the allegation (i.e., limiting its power and communicational force) at the same time that strengthens the State defense. States can leverage the extra time to research the alleged facts, to learn about the views and reactions of the Court, and to prepare a better defense prior the merits. In this way, States can dispute the merits, and reinforce their non-culpability. This is corroborated in 24 of 46 cases in which the defense was successful after States disputed (see more details below).

The decision of objecting would also help in the process of restoring reputation. Since even when the Court denies objections more often (75%), objecting seems to be a claim for the non-culpability of States and the innocence of their AUTHORITIES. Then, States protect their names and authorities by the use of objections since often they carry to the public a joint significance that the State has been part of a process for something in which they do not have the responsibility, at least, at that stage of their processes.

Therefore, the objection is actually a defense of the merits of the case at an early stage in the proceedings that is used when there is not (yet) too much evidence to suggest the State responsibility. The data corroborates that States tend to object in cases in which the Inter-American Commission on HR brought States to trial based on 49 means of

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<sup>36</sup> Castillo Páez v. Peru (Objections), 30 January 1996, Ser. C No. 24, para. 35 (ñ); Benavides-Cevallos, *supra* 7, para. 14.

<sup>37</sup> Separate Concurring Opinion of Judge Sergio Garcia Ramirez in Bamaca Velasquez (Merits) ICHR, 25 November 2000, Ser. C No. 70, para. 3.

evidence.<sup>38</sup> In cases without objections, the Commission appends to its applications a probatory backing of 102 means of evidence on average. Thus, these 49 means of evidence represent a 50% of those that the Commission often used. States can calculate that this is a medium risk concerning responsibility of the State and its AUTHORITIES. This risk is even less when States have exculpatory evidence. In fact, in 65% of these 72 cases, States argued means to exonerate the authority of guilt.<sup>39</sup> By the contrary, when the Commission has considerable evidence (in number and force) States did not object.

States also retain the possibility to dispute the facts and claims of the application after having objected. Disputing can define the factual framework of the case and helps to preserve some reputation since States can reinforce the idea about not admitting guilt. In these circumstances, States leverage the chance to dismiss aspects of the case and (then) dispute its facts and evidence by objecting. The case becomes controversial when the State disputes. Every controversial case -considered on the merits- included an extended discussion of evidence in which the parties offer and controvert the evidence of each.

States dispute the merits when the evidence of their probable culpability is disputable (at

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<sup>38</sup> The Inter-American Commission of HR attaches to its applications a probatory backing of 49 means on average. The same average is reached when the data is separated by initial action in the proceedings (objecting and acquiescing both together). Indeed, States were typically brought to trial based on 49 means of proof on average (these proofs ranged 12 - 102) against States

<sup>39</sup> Escher, *supra* 22 (Non bis in idem); Gomes Lund ("Guerrilha do Araguaia") v. Brazil (Objections, Merits, Reparations, and Costs) ICHR, 24 November 2010, Ser. C No. 219 (Amnesty); 19 Merchants. v. Colombia (Merits, Reparations and Costs) ICHR, 5 July 2004, Ser. C No. 109 (Amnesty and Prescription); Pueblo Bello Massacre. v. Colombia (Merits, Reparations and Costs) ICHR, 31 January 2006, Ser. C No. 140 (Non bis in idem); "White Van" (Paniagua Morales.) v. Guatemala (Monitoring) ICHR, 21 August 2014, para.2 (Non-jurisdiction); Juan Humberto Sánchez. v. Honduras (Objection, Merits, Reparations, and Costs) ICHR, 7 June 2003, Ser. C No. 99, (Shelved case); Heliodoro-Portugal. v. Panama (Objections, Merits, Reparations, and Costs) ICHR, 12 August 2008, Ser. C No. 186 (Prescription); Anzualdo-Castro v. Peru (Objection, Merits, Reparations and costs) ICHR, 22 September 2009, Ser. C No. 202, paras. 162-3 (shelved by amnesty); Ivcher Bronstein. v. Peru. (Merits, Reparations and Costs) ICHR, 6 February 2001, Ser. C No. 74, (Amnesty); Dismissed Congressional Employees (Aguado-Alfaro.) v. Peru. (Objections, Merits, Reparations and Costs) ICHR, 24 November 2006, Ser. C No. 158 (N/A); Serrano Cruz Sisters, *supra* 9 (Prescription) and Moiwana Community, *supra* 11 (Amnesty).

least, initially) and slightly distortable by non-culpability evidence managed. Out of 72 cases with objections, 46 cases were disputed (as it was mentioned above) and 26 cases were acquiesced.

Concerning those 46 cases that were disputed, States have used 17-25 evidence of non-culpability on average to dispute the merits. The data shows that the evidence was disputable when there was no proof of the State responsibility, or it was rendered incomplete.<sup>40</sup> There was refutable evidence - when the States or their AUTHORITIES have rejected the facts that originated the controversy.<sup>41</sup> The evidence was also disputable before declinations and dispute over jurisdiction<sup>42</sup> and when States isolated the failure to provide justice to a particular governmental institution.<sup>43</sup> The facts were also disputable when the domestic criminal processes have not normally developed until its completion.<sup>44</sup>

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<sup>40</sup> Las Palmeras, supra 7 para. 35m) (military judge closes the investigation by lack of proof); Las Palmeras, Id. para. 35n) (Archive by the absence of proof); Fernandez Ortega, supra 7, para 165 (No proof since the victim did not participate in the military investigation); Rosendo Cantú, supra 7 para. 79 (Negligence to ensure proof); Rosendo Cantú Id, para. 86 (no conclusive proof); Cantoral-Huamaní and García-Santa Cruz, supra 7, para. 69 (absence of proof); Cantoral-Huamaní and García-Santa Cruz, Id. para. 70 (lack of proof); Cantoral-Huamaní and García-Santa Cruz, Id, para. 74 (proof indicates there are no victims only terrorists); Montero Aranguren, supra 7 para. 60.62 (lack of proof); Montero Aranguren, Id. para. 60.63 (none culpability neither responsibility by lack of proof);

<sup>41</sup> Rosendo Cantú, supra 7 para. 77 (rejection from National Defense); Radilla Pacheco v. Mexico (Objection, Merits, Reparations, and Costs), ICHR, 23 November 2009, Ser. C No. 209, para. 195 (facts denounced after 18 years by non-imputable reasons to the State); Montero Aranguren, supra 7, para. 60.18 (contestable facts by a duality of authorities); Ituango Massacre, supra 7 para. 313 (rejection of State agents' participation);

<sup>42</sup> Las Palmeras, supra 7 para. 35 (g) (Declination); Fernandez Ortega, supra 7, para. 163 (Disputing jurisdiction between military and ordinary justice); Rosendo Cantú, supra 7 para.142 (Declination); Mariparan Massacre, supra 7, para. 96. (90) (Coalition of jurisdiction).

<sup>43</sup> Trujillo Oroza v. Bolivia (Monitoring) ICHR, 19 November 2009, para. 21(b) (incorrect typification of crime); Radilla Pacheco, supra 54 para. 176 (HR Commission made generic the criminal typification); Cantoral-Huamaní and García-Santa Cruz, supra 7, para. 72 (Poor intervention of 7 prosecutors in the investigation for more than 18 years); Cantoral-Huamaní and García-Santa Cruz, Id, para. 73-4 (lack of judicial initiative of the general prosecutor office); Mariparan Massacre, supra 7, para. 96.36 (Lack of judiciary initiative); Mariparan Massacre, Id, para. 227 (Lack of institutional military support).

<sup>44</sup> Trujillo Orozca v. Bolivia (Monitoring) ICHR, 19 September 2005, para. 4(e) (extinction of criminal action and shelved the case); Mariparan Massacre, Id paras. 96 and 133 (acquittal by the non-pursuit

In addition, the data reveals that for States that have strong judicial proof of a documentary character, States can control the proceedings and neutralize their responsibility and of their AUTHORITIES. This is verifiable in 27 cases of this subgroup that end without judicial obligation ordered by the Court. The management of the disputable evidence serves, accordingly, to save the State's responsibility - as 24 of these 27 cases came from the dispute. In some sense, these defenses were successful. The use of such evidence can allow the restoration of reputation and control of the extent and scope of the proceedings and outcomes.

Even when the Court denies objections, States still retain the possibility to further action by acquiescing before the issuance of judgment on the merits.<sup>45</sup> Then, States acquiesce when there is a likely possibility that there would be a difference in the outcome of the trial. This difference entails damage AUTHORITIES involved. For instance, States can obtain the Court benefits (praises and rewards) if they waive their means of evidence and opt for the application of the expeditiousness and diligence principles, favoring justice for the victim by acquiescing. Likewise, waiving the right to dispute would demonstrate a necessary consensus to end the controversy. On the contrary, a waiver due to lack of proof would undermine the character by which the acquiescence serves to validate the legality of the practice or the binding nature of a norm which was initially rejected by the State.

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of the armed group); Ituango Massacre, *supra* 7, paras. 125 (43) (Revocation of prison); 125 (46) (Revocation of condemnation); para. 125.53 (Cases against two high-ranking authorities are shelved along with prescription in a case against Cmdr.) para. 125.97 (disciplinary process is shelved); Radilla Pacheco, *supra* 54 para. 264 (Dismissal due to the extinction of the criminal action since of the retirement and death of the defendant); Rosendo Cantú, *supra* 7, para. 147 (Shelved by no proof against military responsible).

<sup>45</sup> Rules of Procedure, Article 61. Discontinuance of a Case. When the entity that has presented the case notifies the Court of its intention not to proceed with it, the Court shall, after hearing the opinions of all those participating in the proceedings, decide on the matter and determine the juridical effects of that decision.

Concerning those 26 cases that had acquiescence out of 72 cases with objections, in all these cases there was disputable evidence of the State's responsibility. States had more than 25 pieces of proof of non-culpability on average. As we will review below, when States have only 3 means on average they opt to acquiesce early.

In these cases, there were, also, AUTHORITIES involved in the abuse. States had means to absolve these authorities of guilt. In fact, these means were used on 54% of these cases (but, this percentage is much lesser than the 80% that have those cases in which States opt to dispute). In cases with objection and acquiescence, the evidence of culpability against States and their AUTHORITIES turned in danger in the course of the proceedings. In other words, at the beginning of the proceedings, the proof did not seem extremely dangerous to those cases with AUTHORITIES. It turns plausible objecting rather than merely acquiescing. However, when in the course of the proceedings substantial proof is added against AUTHORITIES, States acquiesced later (i.e. after the objection was submitted and rejected or after the dispute) to offset the incertitude of these cases by controlling consequences.

This pattern of objecting and acquiescence is depicted, for instance, in the Ximenes Lopez (Brazil) case. The State contested the case, but after losing during the preliminary objections, it withdrew part of its argument and accepted partial responsibility.<sup>46</sup> Only after the Court started hear the case did Brazil acquiesce. Even so, the Court praised Brazil's acquiescence, failing to see that Brazil's acquiescence was meant to advance its own interests and avoid the embarrassing, incriminating hearings

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<sup>46</sup> Ximenes-Lopes, supra 31, para 34,35

and testimonies that affect authorities, at the expense of compliance. Eight years and four months later, the case remained in monitoring.<sup>47</sup>

### **3. Early Acquiescence**

In 25% of all cases, States acquiesced early (i.e. at the first submission or before the Court proceedings has started). States do not object since there was undeniable proof of State guilt, and the significance of these cases secured that the State would not deny responsibility. On the other hand, States must do something since there are AUTHORITIES implicated. The admissibility of responsibility places authorities' reputations at risk and exposes them to criminal liability. Nevertheless, States gaining the power and control of the Court proceedings offsets this disadvantage.

One of the States' immediate gains is praise from the Court. These praises allow States to save the reputation of AUTHORITIES and legitimize the more important long-term options – promises, requests, proclamations of limited responsibility and non-intervention, anticipatory remedial actions, etc. These actions can diminish the consequences for AUTHORITIES (see examples since footnote 46).

States acquiesced early in 30 cases. During the merits, as it was noted above, the Court discerns the truth of the controversial claims supported by the evidence. In such a subgroup of cases, States cannot dispute the facts (with evidence) during the merits since by acquiescing they renounce the right of dispute. However, given that there is indisputable proof, then it is not worthwhile to spend time in disputing the merits for States.

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<sup>47</sup> Id paras. 35,36.

In these cases, indisputable proof (against authorities) was constituted by confessions in which AUTHORITIES acknowledged their individual guilt as perpetrators or HR violators and/or institutional responsibilities.<sup>48</sup> Testimonial evidence about linkages of subordination and dependency between perpetrators and institutions of the government are also considered irrefutable proof.<sup>49</sup> The existence of domestic convictions or extraditions of AUTHORITIES also constitute an irrefutable proof when this proof precedes the proceedings.<sup>50</sup> Writing evidence (from government actors) that determines responsibilities against AUTHORITIES is also considered indisputable

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<sup>48</sup> Rochela Massacre, supra 7, para. 142 (confession of fail to provide justice against perpetrators, delayed processes, procedural inactivity and juridical problems); Valle Jaramillo, supra 7, para. 149 (state confession); Huilca-Tecse, supra 7, para. 20 (“the participation and responsibility of the Peruvian State are involved in the proved absence of a complete, impartial and effective investigation into the murder of Pedro Huilca Tecse, as well as concealment designed to hide the truth, those who were really responsible and their accomplices.”) 60.39 (confession of high-ranking authorities against perpetrators); Miguel Castro-Castro Prison, supra 7, paras. 197.17 (there are proof elements that generate more than simple suspicions against highest levels of government that they ordered an operative against victims) 197.63 (Commission created to find responsible and El Amparo v. Venezuela (Monitoring) ICHR, 4 February 2010, para. 8-9 (responsible are identified).

<sup>49</sup> Bulacio Argentina (Monitoring) ICHR, 28 November 2008, para.13 (processes against judges); Garrido and Baigorria, supra 8 para.24 (“the legal consequences resulting from domestic court” that was unable “to identify the person(s) criminally responsible for the crimes against Raúl Baigorria and Adolfo Garrido.”); Tiu Tojín, supra 7, para. 5, 15 (It was recognized by the high-ranking authority “the unjustified delay in the investigation, prosecution, and punishment of those responsible for the facts of the case” was accepted by Guatemala “to develop an immediate, impartial, and effective investigation.”); Goiburu, supra 7 para. 61 (11); La Cantuta, supra 7 para. 80.17 (General recognizing responsibilities of Intelligence Services and linkages with Ministries and militias); La Cantuta v. Peru (Monitoring) ICHR, 20 November 2009, para. 7; Gómez Palomino, supra 43, para. 54.15) (Statement recognizing linkages between authorities and responsible group); Amparo v. Venezuela (Interpretation) ICHR, 16 April 1997, para. 3 and 5 (It was established the relation between presidential actions and the operation ordered, which would be questioned and exposed during the judgment process); Blanco Romero, supra 8 para. 51 (6) (General recognizing responsibilities for HR violation against victim).

<sup>50</sup> Bulacio, supra 7 para.14 (prison); Garrido and Baigorria v. Argentina (Monitoring) ICHR, 27 November 2007 para. 6 (b) (Irrefutable proof to dismiss responsible judge and separation of all responsible police agents); Ticona Estrada, supra 7 para. 144 (Conviction against coronel); Ticona Estrada v. Bolivia (Monitoring Judgment) ICHR, 23 February 2001, para.6 (a) (Conviction 5 high military); Rochela Massacre, supra 7 paras. 154 (4 accused and 8 convicted), and 209 (Disciplinary investigation against high-ranking authorities and judges); Valle Jaramillo, supra 7 para. 147 (Accusation against 10 and 2 convictions); Valle Jaramillo. v. Colombia (Monitoring) ICHR, 28 February 2011, para. 18 (extradition); Servellón-García, supra 7, para. 70.47 (arrest orders); Goiburu, supra 7, para. 61 (11); La Cantuta, supra 45, para.7; Goiburu, supra 7, paras. 7-8, 11, 14; Miguel Castro-Castro Prison, supra 7, para. 197.66 (2 convictions); Miguel Castro-Castro Prison v. Perú (Monitoring) ICHR, 31 March 2009 (Presidential extradition).



proof.<sup>51</sup> Besides, groups of evidentiary proceedings that have an accusatory and compelling character are irrefutable proof.<sup>52</sup> Sometimes the mere failure to enter an appearance to the claim or the State contumacy made the proof indisputable.<sup>53</sup>

Examples include the cases of Myrna Mack Chang, of the Massacre of Plan de Sánchez, of the 19 Tradesmen, of the Mapiripán Massacre, of the Massacre of the Moiwana Community, of the Ituango Massacre - in which the State's intent to commit gross violations of HR, or its express negligence to avoid them, were irrefutably proven.<sup>54</sup>

The data in the paragraphs above are meant to demonstrate the tendency by which acquiescing is used rather than objecting in cases where there is evidence. Given in the

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<sup>51</sup> Maritza Urrutia, *supra* 43, para. 127 (resolution from general prosecutor); Kawas Fernández, *supra* 7 (Honduran Attorney General's Office issues a report stating that Kawas Fernández's murder was the result of her environmental activities and that State agents were allegedly involved in planning her murder and obstructing the investigation); Miguel Castro-Castro Prison, *supra* 7 para. 197.4 (Report from Commission of Truth and Reconciliation); Miguel Castro-Castro Prison, *Id.* para. 197.15 (Presidential Decree ordered the violation); Huilca-Tecse, *supra* 7 para. 60.50 (congress investigation against president and collaborators) 60.53 (constitutional accusation against high-ranking authorities); Servellón-García, *supra* 7 para. 79.36) (report of HR office regarding perpetrators); Chitay Nech, *supra* 7, para. 65 (The CEH concluded that, 91% of the violations it registered were carried out during years 1978 and 1983, under the dictatorships of the Generals Romeo Lucas García (1978-1982) and Efraín Ríos Montt (1982-1983). On the date of the disappearance of [...], General Romeo Lucas García exercised the role of President of the Republic and Commander in Chief of the Army and General Ángel Aníbal Guevara Rodríguez was the Minister of National Defense [as their responsibilities were determined]).

<sup>52</sup> Escue Zapata, *supra* 7, paras. 110 and 163; Escue Zapata v. Colombia (Monitoring Judgment) ICHR, 18 Mayo 2010, para. 11; El Caracazo, *supra* 7 para. 69.15 (Criminal persecution against 2 high-ranking State agents); Gómez Palomino. v. Peru (Monitoring) ICHR, 01 July 2009, para. 11 (Criminal persecution against 12 State agents alleging the crime of lesa humanity); Gómez Palomino. v. Peru (Monitoring) ICHR, 05 July 2009, para. 17 (creation of investigatory commission and extension the scope of the criminal persecution against Prime Minister of Peru); Baldeón-García, *supra* 7 para. 73.35) (Attorney General's Office of HR started a criminal persecution); Miguel Castro-Castro Prison, *supra* 7, para. 197.61. (Existence of judicial investigations); Miguel Castro-Castro Prison *Id.*, para. 197.70 (Accusation against high-ranking authorities); Huilca-Tecse v. Perú (Monitoring) ICHR, 27 August 2013, para. 5 (a) (Criminal investigation against prime minister and high-ranking authorities); Servellón-García, *supra* 7 para. 79.40 (Criminal processes against military members); Bulacio, *supra* 7 para. 6 (process against high-official); Jaramillo, *supra* 7 para. 6 (investigations).

<sup>53</sup> Carpio Nicolle, *supra* 7; Barrios Altos, *supra* 7.

<sup>54</sup> Myrna Mack Chang, *supra* 7; The Massacre of Plan de Sánchez, *supra* 7; 19 Tradesmen *supra* 29; The Mapiripán Massacre *supra* 7; The Massacre of the Moiwana Community, *supra* 11; The Ituango Massacre, *supra* 7.

cases there are AUTHORITIES, thus, acquiescing is also used rather than doing nothing.

There are 24 cases with AUTHORITIES out of 30 cases with early acquiescence.

It is neither worthwhile disputing the evidence when the State has not too many means to defy the core facts in dispute.<sup>55</sup> In addition, States that acquiesced early did not produce the evidence needed to overturn the allegations against them since States have few judicial pieces to counteract the weight of the contradictory evidence. In fact, in these cases, State judicial pieces to include in its defense fell to 3 of 25 (on average). I have already presented this data. In this way, the possibility of using exculpatory evidence also diminished. The risks of authorities to be incriminated increases due to States having fewer mechanisms to exonerate the authority of guilt. In effect, States were able to use them for 27% of this subgroup of cases. Recall that in cases with objections, the mechanism to exonerate was used in 65% of the cases. Therefore, if States do not have proof to promote a defense nor means to limit responsibility by their AUTHORITIES, the case is indisputable, and an early acquiescence is a way to control the damage.

Article 64 of the Rules of Procedure allows the Court to discontinue review of the case after it has received acquiescence. One would observe the beneficial effects of a Court that takes a pragmatic reaction to acquiescence. However, in resolving acquiescence, the data shows that the Court again reacts idealistically – as we have seen above in its consideration of objections. In this way, the Court rather than closing cases and striking them out from the docket, accepted either fully or partially all acquiescence submitted, conserving its jurisdiction over them.<sup>56</sup>

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<sup>55</sup> Cavallaro & Brewer, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, 804 (2008).

<sup>56</sup> Rules of Procedure, Article 64 (“Continuation of a Case. Bearing in mind its responsibility to protect HR, the Court may decide to continue the consideration of a case notwithstanding the existence of the conditions indicated in the preceding Articles.”)

The Court conserves cases since the international HR process of responsibility is a matter of international “public order” not just a conflict between the parties in a case.<sup>57</sup> Given this public nature of the process, the Court praises the act of acquiescence as a positive contribution to the System (as shown in section II of this Chapter).<sup>58</sup> These praises offset costs derived from the admission of guilt. When States have recognized their culpability through acquiescence, they are admitting that they have broken a normative commitment to the International order. The Court considers acquiescence as an action that mitigates responsibilities.<sup>59</sup>

States leverage Court considerations to save reputation and put legitimacy face to their AUTHORITIES. Even more important States gain long-term benefits, they gain in an interaction in which they have the Court acquiescence rewards. These rewards are the use of alternative actions during the Court proceedings and a diminished monitoring. States use these rewards to protect AUTHORITIES. The acquiescence also allows States to start altering the distribution of power between States and Courts during the proceedings. By this alteration, States gain more power than the Court to influence, direct and control the Court proceedings. Regarding benefits, acquiescing turns out to be less costly in political terms and may likely account for the State’s low compliance in these cases (see in the next stages).

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<sup>57</sup> Kawas Fernández, *supra* 7, para. 24 (Since the proceedings before this Court relate to the protection of HR, a matter of international public order that goes beyond the intent of the parties, the Court must ensure that acts of acquiescence are acceptable for the purposes of the Inter- American system. To this end, the Court does not limit itself to merely verifying the formal conditions of the said acts, but relates them to the nature and gravity of the alleged violations, the requirements and interests of justice, the particular circumstances of each case, and the attitude and position of the parties). Rosendo Cantú, *supra* 7, para. 22; Kimel, *supra* 7, para. 24; Chitay Nech, *supra* 7, para. 18; Manuel Cepeda Vargas, *supra* 7, para. 17; “Cotton Field,” *supra* 7, para. 25; Ibsen, *supra* 7, para. 34; Fernandez Ortega, *supra* 7, para. 22; Velez Lloor, *supra* 7, para. 63; Xakmok Kasek Community v. Paraguay (Merits, Reparations, and Costs) ICHR, 24 August 2010, Ser. C No. 214, para. 30.

<sup>58</sup> *Id.* *supra* 7.

<sup>59</sup> Rules of Procedure, Article 62

All in all, in 44 out of 56 cases in which States acquiesced (early or later), there are AUTHORITIES (78.5%). Moreover, depending (again) on the type of proof that threatens AUTHORITIES, States include promises of compliance along with their acquiescence. If admitting guilt serves as a mitigating factor of responsibility (as I said above), a promise may decrease the likelihood of receiving a judicial obligation. The judicial obligation is one of the seven categories described in Chapter 2, Section B.3 by which States are ordered to prosecute authorities (further details in stage 4). The Court commanded a judicial obligation to prosecute authorities in 40 out of those as mentioned earlier (56 cases).

### ***Promising compliance***

The data also reveals that when we restrict our attention only to cases with AUTHORITIES, there are 39 (out of these 56) cases with promises. Chapter 2 described promises as phrases used to ensure present or future State actions toward compliance. These promises attest that States have the disposition to internalize the norm of accountability and to work in correcting the violation.<sup>60</sup> With these commitments, States provide "some" security and predictability to the Court that States will conduct future obligations. There are a diversity of promises regarding the judicial responsibility, particularly, prosecuting and punishing. For instance, in the Tiu Tojin (Guatemala) case, the State stated during the Court proceedings “the unjustified delay in the investigation, prosecution, and punishment of those responsible for the facts of the case” was accepted by Guatemala “to develop an immediate, impartial, and effective investigation.”<sup>61</sup>

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<sup>60</sup> Tiu Tojin, *supra* 2, paras. 5, 15

<sup>61</sup> *Id.*

In the Gutiérrez-Soler (Colombia) case the State stated during the Court proceedings as in the Judgment on Merits, Reparations and Costs appears “[the State is] willing to investigate, try and punish the individuals responsible for the injuries sustained by Mr. Wilson Gutiérrez-Soler,” even “without there being any conviction,” and “as an obligation limited to its best efforts.”<sup>62</sup>

In the Huilca-Tecse (Peru) case the State stated during the proceedings on Judgment on Merits, Reparations and Costs: “the participation and responsibility of the Peruvian State is involved in the proved absence of a complete, impartial and effective investigation into the murder of Pedro Huilca Tecse, as well as concealment designed to hide the truth, those who were really responsible and their accomplices.”<sup>63</sup>

In the Benavides Cevallos (Ecuador) case the State stated during the proceedings “responsibility for the arrest, unlawful detention, torture and murder of Benavides Cevallos perpetrated by official agents.”<sup>64</sup>

In the Garrido and Baigorria (Argentina) case the State stated during the Court proceedings as in the Judgment on Merits “the legal consequences resulting from domestic court” that was unable “to identify the person(s) criminally responsible for the crimes against Raúl Baigorria and Adolfo Garrido.”<sup>65</sup> In the Bueno Alves (Argentina) case the State stated during the Court proceedings as in the Judgment on Merits “it

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<sup>62</sup> Gutiérrez v. Colombia (Merits, Reparations and Costs) ICHR, 12 September 2005, Ser. C No. 132, para. 92

<sup>63</sup> Huilca-Tecse v. Perú (Merits, Reparations and Costs) ICHR, 3 March 2005, Ser. C No. 121, para. 20

<sup>64</sup> Benavides-Cevallos v. Ecuador (Merits, Reparations and Costs) ICHR, 19 June 1998, Ser. C No. 38, para. 35

<sup>65</sup> Garrido and Baigorria v. Argentina (Merits) ICHR, 2 February 1996, Ser. C No. 25, para. 24

[...will] make its best efforts to conclude as soon as possible the investigations into the facts which caused damage to Mr. Bueno-Alves.”<sup>66</sup>

In the Vargas Areco (Paraguay) case the State stated during the proceedings on Judgment on Merits, Reparations and Costs that Paraguay undertakes “to further the proceedings initiated before regular criminal courts until final judgment is rendered.”<sup>67</sup>

A couple of juridical consequences were constructed from these promises. On the one hand, the parties to the case place particular attention to these pledges since they often represent symbolic ways of reparation, and, particularly, they can work as a tool to future claims. When third parties of the procedures claimed noncompliance during the monitoring, for instance, they appeal to the existence of acquiescence and promises. The parties seem to expect States capable of acting from moral. On the other hand, States calculate a positive reaction from the Court since these promises reinforce their commitments. Under this understanding, they seem to expect that their promises can influence future obligations. At least, it has happened for cases with AUTHORITIES.

The value of persuasive discourse -including commitments and promises of compliance- is that the Court ends up by feeling less comfortable in rejecting acquiescence from States that are more likely, as they express in their promises, to offer to concede or appear compelled with their HR. Accordingly, it seems to be the case that the Court confers simultaneously legitimacy to the State actions and praises the expressions used in the acquiescence. For example, in the Escue Zapata (Colombia) case, the Court stated in its Judgment on Merits, Reparations and Costs “acquiesce is a positive

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<sup>66</sup> Bueno Alves v. Argentina (Merits, Reparations and Costs) ICHR, 11 May 2007, Ser. C No. 164 para. 210

<sup>67</sup> Vargas v. Paraguay (Merits, Reparations and Costs) ICHR, 26 September 2006, Ser. C No. 155, para. 10

contribution toward the proper fulfillment of the Inter-American human rights jurisdictional function and, in general, the enforcement and the effectiveness of the principles enshrined by the American Convention.”<sup>68</sup> Likewise, in the Zambrano-Velez (Ecuador) case the Court in its Judgment on Merits, Reparations and Costs remarks the value of acquiesces, particularly, “[...as a] positive step toward the vindication of the victims’ memory and dignity.”<sup>69</sup>

Therefore, the Court behavior exhibited regarding these promises can be predictable if it takes into account that the Court conferred legitimacy for State statements of responsibility rather than the act of complying.

Such legitimizing occurs since the Court expects States to renew commitments to justice and accountability that the HR System proclaims.<sup>70</sup> States act as the Court expects, turning acquiescence into an opportunity for declaring a formal normative commitment that signals HR compliance even while they are in violation. These commitments make States into partners with the Court in the advancement of the HR project. The Court seems to react positively to a language that was as close as possible to an almost fully embodied commitment to HR norms.<sup>71</sup> States routinely invoked a discourse that includes compliance, non-repetition, and remediation. As such “[t]he

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<sup>68</sup> *Escue Zapata v. Colombia*, (Merits, Reparations and Costs) ICHR, 4 July 2007, Ser. C, No. 165, par. 20.

<sup>69</sup> *Zambrano Velez v. Ecuador* (Merits, Reparations and Costs) ICHR, 4 July 2007, Ser. C No. 166, para. 10.

<sup>70</sup> Rules of Procedure, Article 64, the Court may decide to continue the consideration of a case, after it has received acquiescence. The Court decides its admissions based on nature and gravity of the alleged violations, the circumstances of the case, and the position of the parties to accept acquiescence are taken into account. *Gelman v. Uruguay* (Merits and Reparations) ICHR, 24 February 2011, Ser. C No. 221, para. 26; *Rosendo Cantú*, *supra* 7, paras. 16-26. *Id. supra* 41.

<sup>71</sup> The positive Court reactions to acquiescing are part of a discourse that uses 3 common phrases: In 33 cases, the Court used the phrase “positive contribution.” The phrase “valuable contribution” was used 3 times. The last phrase used by the Court was “important step toward” in 6 cases. These cases were enlisted on footnote 7. I will discuss some of these cases in Part IV.

Government's strategy is recognizing responsibilities and proposing integrated procedures for attending to the victims based on the right to truth, to justice and to obtain fair reparation.”<sup>72</sup> These commitments and expressions have empowered the victims and their representatives, the Commission, advocates, civil society and non-state actors with the tools to pressure governments toward compliance during monitoring.

Stages 4 and 5 produce many of the compliance data. However, a picture emerges from the Court proceedings. This picture notes that in 56 cases, States acquiesce, particularly justice violations, since the chance to deny responsibility is minimal and there is undeniable proof of State guilt. Moreover, these States offer little information about the alleged HR violation and violators. By this reason, it is feasible to assume two things. First, the data suggests that the irrefutable accusatory evidence along with its publicity/visibility is a factor in increasing State's willingness to acquiesce, Secondly, acquiescence becomes a defense in the proceedings and has, in fact, various political purposes, among them, be the first action in a concatenated series of activities. *It is yet much too early, at this first Stage to establish if acquiescence or its related behaviors involve a meaningful commitment by the State to prosecute authorities. To the same extend, it is much too early, of course, to tell whether and how well the Court will be able to discharge one of the most pressing and elusive of its goals: the prosecution of HR violators.*

## **B. Stage 2. Exchange**

States that have acquiesced can gain more control of the proceedings by initiating a stage of exchange after the Court accepts the acquiescence and before the facts of the

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<sup>72</sup> Barrios altos, supra 7, para. 31.



case get to the public.<sup>73</sup> States can preempt the Court's exposure of information and issuance of judgments through requests. The option of requesting is, restricted to the 56 acquiescence cases (out of 118) and does not apply to the 16 instances in which States did nothing or to those 46 cases where States objected and then disputed the petitioners' factual allegations.

The Court is tasked with responding to these State requests. Such requests would then restrict the Court from assessing evidence during the merits of the case or free the Court from the factual analysis. A Court like the ICHR could find these requests attractive to economize on the process and monitoring responsibilities. The data shows, however, changes in how the Court responded to State requests. The Court admitted most of the requests in judgments issued before 2007. Since 2007 the Court recognized adverse consequences of applying admissibility. The magnitude of the HR abuse is not recorded in its totality in judgments, undermining the victims' rights. Consequently, the Court changed to a tendency of inadmissibility. This change (from admissibility to inadmissibility) also changed the State response by reducing the number of requests. The Court may also restrict information in the absence of State requests.

Basically, because of all these restrictions of information, States immediately gain in that their AUTHORITIES remained free from reputational damage. States also were released to use a subsequent action-strategy. A significant long-term benefit is that States prevented either entirely or to some extent taking actions against their AUTHORITIES in the case that the Court admits State's requests.

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<sup>73</sup> The data reports that the Court has accepted all offers of acquiescence.

## **1. The type of State requests**

The Court case involves complex patterns of facts. These “facts require proof (information) to demonstrate the physical occurrences of the violations alleged and the State knowledge of or participation in these events, as well as the role of authorities in their investigation.”<sup>74</sup> In cases in which acquiescence is joined to AUTHORITIES (44 out of the 56), States have acquiesced to the specific violations alleged to control the damage against AUTHORITIES that comes from the factual controversy that originated the case. If the information (evidence of guilt) is not stopped before the Court deliberates its judgment, it ends by substantiating the narratives of proven facts about the participation of AUTHORITIES in HR violations within the Court’s merits judgments.<sup>75</sup> A demonstrated participation ends in future reputation damage, and even worse, a domestic criminal prosecution of AUTHORITIES.<sup>76</sup>

In this way, States retain the option to request until critical information comes to light. States can request even after the oral proceedings have started. Oral proceedings are not mandatory according to the Court Rules of Procedure, the Court, however, opens this oral phase to gather evidence. Accordingly, 3 types of requests seek to impede the damage by restricting the merits phase of the case, the controversy of the facts or the Court hearings.

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<sup>74</sup> Cavallaro & Brewer, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, 793 (2008).

<sup>75</sup> The Court performs factual analysis in the following cases: Albán Cornejo, *supra* 7 para.25; Baldeón-García, *supra* 7, paras. 56-58; Blake, *supra* 8 para. 29; Caballero Delgado and Santana, *supra* 8, para. 17; Huamaní and García-Santa Cruz, *supra* 7 paras. 35-37; Escué Zapata v. Colombia (Interpretation of Merits, Reparations and Costs) ICHR, 5 May 2008, Ser. C No. 178, para. 21; Kimel, *supra* 7, para. 27; Maritza Urrutia, *supra* 43, para. 44; Ximenes Lopes, *supra* 7, para. 79, 81; Tiu Tojín, *supra* 7, para. 26; Vargas-Areco, *supra* 7, para. 66.

<sup>76</sup> Thus, an adversarial consideration of the merits or living testimonies and fact-finding end damage States. See Albán Cornejo, *supra* 7; Blanco Romero, *supra* 7; Caballero Delgado and Santana, *supra* 8; Molina-Theissen, *supra* 7; Ximenes Lopes, *supra* 7.

An illustration of request restricting the *merits* phase of the case is the Aloeboete (Suriname) case. In this case, after two declarations of acquiescence by Suriname, the State Agent declared during the Court proceedings as appears in the Judgment on Merits "I believe my statement was clear: it accepts responsibility. Consequently, the Court has the right to close the case, file it [...]." <sup>77</sup>

The Court, in this case, noting the admission of responsibility and ceasing controversy regarding the events that gave rise to the case. <sup>78</sup> On December 4, 1991, the Court closed the case without issuing reparations and costs judgments.

Through Court concessions, States gain control in the process. As the Aloeboete Case illustrates the Court delegated (in the State) responsibility for reparations to the victims. <sup>79</sup> When on December 4, 1991, the Court closed the case without issuing reparations and costs judgments. Two years later since the Suriname government opposes reparations and costs claimed by the Commission, the Court reopened the case and ordered concrete action through a ruling issued on September 10, 1993. <sup>80</sup>

Regarding requests restricting the controversy of *the facts*, In Venezuela's Amparo case, the State accepted responsibility <sup>81</sup> and asked the Court's permission to negotiate reparations directly with the Commission. <sup>82</sup> Consequently, by judgment dated January 18, 1995, the Court took note of the acquiescence of responsibility [...] and decided that the controversy concerning the facts that originated the case has ceased. <sup>83</sup> Additionally, it granted the parties a period of six months to reach an agreement on

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<sup>77</sup> Aloeboete v. Suriname, (Merits) ICHR, 4 December 1991, Ser. C No. 11, para. 22

<sup>78</sup> Id., para. 1.

<sup>79</sup> Id., para. 1.

<sup>80</sup> Aloeboete v. Suriname, (Reparations) ICHR, 10 September 1993, Ser. C No. 15, para. 25 and considering 1.

<sup>81</sup> El Amparo v. Venezuela (Merits) ICHR, 18 January 1995, Ser. C No 19, paras. 1 and 3.

<sup>82</sup> Id.

<sup>83</sup> Id., para. 1

reparations.<sup>84</sup> After eighteen years and two months, only the financial reparation had been met with compliance while the State has not prosecuted the responsible parties. See footnote concerning other cases in which the States managed agreements to control financial reparations.<sup>85</sup>

The Court generally held more than one oral *hearing* to gather evidence. States request restriction of these hearings since they may verify the facts that support legal claims and generate - around the shaming and naming effect - international publicity that affects and puts pressure on offending states. For instance, in the Myrna Mack (Guatemala) case, the State acquiesced because of the existence of indisputable proof since the victim's family unsuccessfully tried to pursue justice at the domestic level for nearly a decade in the 1990 assassination of an HR activist by paramilitary. Then, the State sought to convince the Court that its acquiescence to the facts eliminated the need for Court hearings or preserving the application. Guatemala requests to avoid that incriminatory information becoming public. The Court rejected the State requests. The

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<sup>84</sup> Id., para. 3

<sup>85</sup> Benavides-Cevallos, *supra* 65, para. 35 (the Ecuadorian State acknowledges its responsibility in the events in question and undertakes to make reparations through the *friendly settlement* arrangement); Blanco Romero v. Venezuela (Merits, Reparations and Costs) ICHR, 28 November 2005, Ser. C No. 138, para. 27 (the State of Venezuela "acknowledge[s] its international responsibility in the instant case" and "offers a *friendly settlement*"); Garrido and Baigorria, *supra* 66, para. 28 (the Government has requested of the Court, "*the suspension of the proceedings*" for a period of six months for the purpose of reaching an *agreement*"); Gutiérrez Soler, *supra* 63, para. 26 (Requests [...] the opportunity to reach [...] a *friendly settlement* on reparations and indemnities, for which the State proposes a maximum delay of six months); Huilca-Tecse, *supra* 64, para. 44 (Following the State's acquiescence, the representatives and Peru reached an *agreement* on the methods and time limits for complying with the reparations); Molina-Theissen, *supra* 2, para. 7 and 10 (During the procedure for the *friendly settlement* of several cases being processed before the Commission, the President of the Republic of Guatemala, at that time, Alfonso Portillo, acknowledged the State's "international responsibility" in the case of Molina Theissen); Tiu Tojín, *supra* 2, para. 5 (The State indicated that it had adopted some of the recommendations of the Commission to repair the violations to human rights, specifically: an act of apology presided by the Vice-President of the Republic, *payment of an economic compensation* to [...]); Vargas-Areco, *supra* 68, para. 10 (The State undertook "to further on the proceedings initiated before regular criminal courts until final judgment is rendered" and "*to allow a term of 1 (one) year to provide fair reparation*, given that administrative formalities must be complied with to include in 2006 National Expense Budget the compensation to be paid to the victim's judicially recognized heirs.").

State left the proceedings and refused to hear witness testimony. In addition, the State rescinded the acquiescence, claiming the existence of an “excessive interpretation” of its statement.<sup>86</sup> These actions tried to lock accusatory information. Similar language used in an ample request. In Mariparan massacre (Colombia) case, State asks the [...] Court to take this acquiescence into consideration and give it full legal effect, therefore limiting the hearings on the merits and the subsequent proceeding to the study of reparations and costs, as well as to pleadings on the merits regarding compliance [...].<sup>87</sup>

Once the Court admitted the State’s requests, the controversial process, fact-finding (i.e., an analytical procedure to judge the adverse claims about evidence of the parties)<sup>88</sup> and factual analysis became unnecessary.<sup>89</sup> A negative consequence is that less factum and information make the Court jurisprudence become less visible in generating pressure from third parties. That entails that States won control over the accusatory information and proceedings. In 33 cases, States use one of the three types of requests to restrict the Court from assessing information during the merits of the case.<sup>90</sup> This number is regarding cases in which acquiescence joins to AUTHORITIES (44 out of the 56). In 22 cases, the Court admitted State requests.

## **2. Two tendencies to resolve State requests**

As noted above, a Court like the ICHR, with a budget that is well below that of other Courts; could find means of expedited case resolution, like acquiescence and its

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<sup>86</sup> Myrna Mack-Chang v. Guatemala (Merits, Reparations, and Costs) ICHR, 25 November 2003, Ser. C No. 101, paras. 70, 73 and 75

<sup>87</sup> Mariparán Massacre v. Colombia (Merits, Reparations, and Costs) ICHR, 15 September 2005, para. 33 (4).

<sup>88</sup> They are elastic and informal. Cantoral Benavides, *supra* 11, para. 45.

<sup>89</sup> The Court did not perform factual analysis in the following cases: El Amparo, *supra* 8, para. 20; Benavides-Cevallos, *supra* 7, para. 42; Blanco Romero, *supra* 7, para. 32; Garrido and Baigorria, *supra* 8, para. 27; Gutiérrez Soler, *supra* 7, para. 31 and 50; Huilca-Tecse, *supra* 7, para. 60; Molina-Theissen, *supra* 7, para. 42.

<sup>90</sup> Cavallaro & Brewer, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, 802-3 (2008).

associated requests, attractive since it allows economizing on the process and monitoring responsibilities.<sup>91</sup> The data tells us another story and the Court developed two tendencies in responding to State requests. The Court tended to admit most of the requests issued before 2007.<sup>92</sup> Since 2007 the Court tended towards inadmissibility.<sup>93</sup> The reason for this change is that the Court discovered that the reduction of factual information about HR violations is an adverse consequence of its admissibility decisions. The Court tried to block these effects with inadmissibility.<sup>94</sup> This Court action-decision changed the way by which the States responded. The most visible change was that the number of submitted requests decreased after 2007.

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<sup>91</sup> Only for the purpose of illustrating since these international courts each play different roles. As of 2011, the Court's budget was US\$4 million, while the ICC and ICTY had budgets of US\$150 million each.

<sup>92</sup> There are requests in 24 cases in which a judgment was issued before 2007. In 18 cases, State requests were admitted. The following 10 cases illustrate the admission: *Aloeboete v. Suriname*, (Merits) ICHR, 4 December 1991, Ser. C No. 11, para. 22 and decision 1 (restricting case); *Bulacio*, supra 7, para. 31 (s) (restricting case); *Garrido*, supra 8, para. 28 (restricting case); *Maritza Urrutia*, supra 43, paras. 16 and 30 (restricting case); *Barrios-Altos*, supra 7, paras. 31 and 38 (restricting case); *Amparo*, supra 8 decision, para. 1 (restricting case); *Benavides-Cevallos*, supra 7, paras. 27 and 35 (restricting hearings); *Carpio Nicolle*, supra 7, para. 36 (restricting hearings); *Gómez Palomino*, supra 43, para. 16 (restricting hearings); *Molina-Theissen*, supra 7, para. 2 (restricting facts).

In 6 cases State requests were rejected before 2007. The following 4 cases illustrate the rejection: *Gutierrez Soler*, supra 7, para. 26; *Blake*, supra 8, para. 27; *Myrna Mack Chang*, supra 7, paras. 75 and 81 and *Huilca-Tecse*, supra 7, paras. 27 and 63.

<sup>93</sup> There are requests in 6 out of 24 cases in which a judgment was issued after 2007. In 3 cases were admitted: *Cantoral-Huamani*, supra 7, para. 123; *Baldeón-García*, supra 7, paras. 26 and 45 and *Montero Aranguren*, supra 7, paras. 51 and 58.

In 6 cases were rejected such as *Servellon Garcia*, supra 7, para. 23; *La Cantuta*, supra 7, para. 44; *Chitay Nech*, supra 7, para. 14.

<sup>94</sup> Since 2003, the Court started timidly to question the restriction of the proceedings requested by States at the moment to acquiesce. Indeed, in the *Myrna Mack Chang* (Guatemala) case the Court stated, "[T]he Court can determine whether the [acquiescence] made by the defendant State offers a sufficient basis, in the terms of the American Convention, to continue the hearing on the merits and to determine the possible reparations [...]." See *Myrna Mack Chang*, supra 7, para. 105; *Rosendo Cantú*, supra 7, para. 21; *Ibsen Cárdenas*, supra 7, para. 33; *Gelman*, supra 59, para. 26. Later, the Court was explicit to say that "[...T]he acquiescence is acceptable for purposes of the Inter-American System of HR, which seeks to satisfy, [when] [...] [acquiescence] does not impede in the administration of justice in the case. Thus, the Court does not limit its authority to confirming, recording, or taking note of the acknowledgment or verifying the formal conditions of such actions, but rather it must [...] determine, insofar as is possible, and in the exercise of its competence, the truth of what occurred in the case." See *Kimel*, supra 7, para. 24. It was reaffirmed in *Rosendo Cantú*, supra 7, para. 22 and *Ibsen Cárdenas*, supra 7, para. 34. See *Manuel Cepeda Vargas*, supra 7, para. 17 (regarding the truth).

Admissibility tendency, I found requests in 24 cases in which the judgment was issued before 2007. The Court admitted 18 of these 24. Regarding these judgments issued before 2007, the Court admitted the restriction of oral evidence reducing hearings (entirely or partially),<sup>95</sup> testimonies and expert opinions, and the narratives of proven facts to fewer paragraphs.<sup>96</sup> States calculate this positive reaction as the principles of expeditiousness and diligence that governed HR proceedings were applied to cases with acquiescence. Given these principles, the Court could provide timely justice and reduce its caseload. For instance, the Court did halt some parts of the merits phase. Thus, the duration of the judicial proceedings for acquiescence cases is 246 days, while in cases without acquiescence it is 1275 days.<sup>97</sup>

Inadmissibility tendency, since 2007, the Court recognized in its decisions that a tendency to admissibility entails less information about violations and adopted a tendency to inadmissibility. In fact, the Court admitted 4 of 9 requests submitted during this period, thus, admission fell to 4 to 18. The Court progressively began not applying the expeditiousness and diligence principles in cases with acquiescence. This change seems to counteract a tactic on litigation (regarding the use of requests) by which the generation of information (evidence of guilt, for instance against AUTHORITIES) is weakened. A consequence of this weakening of the information is that there is no information about

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<sup>95</sup> Mariparán Massacre, Id., para. 37; Montero Aranguren, Id., paras. 21 and 26 (reduction in length of the scheduled hearing)

<sup>96</sup> Cavallaro & Brewer, AMERICAN JOURNAL OF INTERNATIONAL LAW, 767-8 (2008).

<sup>97</sup> The average duration was calculated based on the time elapsed between the dates the case was submitted to the Court and the date the judgment on merits was issued.

HR violators to be used for non-state actors (NGOs, civil society and advocates) in order to pressure future compliance or follow-up judgment compliance.<sup>98</sup>

According to the data, this change to inadmissibility resulted in an increase in the factual analysis. During these analyzes, the Court establishes the inclusion of facts recognized in the acquiescence.<sup>99</sup> In consequence, not every case in which the State acquiesced for the alleged violation ended the controversy regarding this alleged violation. In fact the Court “[...]ay determine whether the [acquiescence] is sufficient to provide grounds to proceed or not with the trial on the merits and with the determination of any applicable reparations.”<sup>100</sup> To this end, the Court analyzes “each case individually”<sup>101</sup> and when the Court has doubts about a particular acquiesced fact or violation, the Court will declare that a controversy continues in this fact or violation. The Court can also decide about the inclusion (or not) of full and partial factual records in cases with acquiescence.

In particular, the data shows that the Court rejected all requests to restrict hearings (4 of the 5 rejected requests were directed to restrict hearings). Instead, the Court conducted hearings saying that they are needed to assess the context of the HR violation.

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<sup>98</sup> David P Fidler, Navigating the global health terrain: mapping global health diplomacy, 6 *ASIAN J. WTO & INT'L HEALTH L & POL'Y*, 29-30 (2011). (The Importance of non-state actors lies in its potential capability to affect the distribution of power in the international system. The preferences of non-State actor remain independent of formal structures and processes of government.) In my understanding of the data, the actions of the Court can shape non-State actor preferences (such as NGOs) by empowering them. In this case, the open-source anarchy theorized by Professor Fidler “as a governance space, as accessible to, and shaped by, non-State actors, as well as States,” seems to have the sense of the participation of NGOs in the interaction between States and the Court. Particularly, since NGOs (and States) resist governance reforms that would restrict their freedom of action.

<sup>99</sup> Baldeón-García, *supra* 7, para. 56; Mariparán Massacre, *supra* 7, para. 69; Gutiérrez Soler, *supra* 7, para. 26.

<sup>100</sup> Huilca Tecse, *supra* 7 para. 42; García Asto and Ramírez Rojas, *supra* 7, para. 65; Acevedo Jaramillo, *supra* 7, para. 173.

<sup>101</sup> Huilca Tecse, *Id*, para. 42; García Asto and Ramírez Rojas, *supra* 7 para. 65; Acevedo Jaramillo, *Id*, para. 173.



The record of these oral testimonies served as evidence to the judgment issued during this jurisprudential period. Consequently, cases with rejected requests continued to the controversial consideration of merits.<sup>102</sup>

This change (from admissibility to inadmissibility) changed the States response. States did calculate this systematic change (toward the inadmissibility) in the Court's behavior. Since 2003 members of the Court stressed the necessity of changes (in the Court practices regarding issues of acquiescence) in their dissenting opinions.<sup>103</sup> Thus, the chances to control the information by request were progressively decreasing as the disapplication of the expeditiousness and diligence principle was elaborated. This new tendency toward the inadmissibility affected the State response. States expected that their requests would be rejected. In fact, the number of requests fell to 9 to 24 (while that the judgments issued increase). Consequently, this reduction can be explained in which States would opt to file claims in cases in which significant evidence threatened AUTHORITIES and not to file if they could forecast that scapegoats or agents of low-position may assume culpability for AUTHORITIES.

### **3. The Court changes and its restriction of information**

The Court generally acknowledges that the scope and context within which systematic violations occur need be established<sup>104</sup> and also an in-depth fact-finding is required to avoid that acquiescence diverts attention from facts that are necessary to

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<sup>102</sup> Gutierrez Soler, *supra* 7, para. 26; Blake, *supra* 8, para. 27; Myrna Mack Chang, *supra* 7, paras. 75; Chitay Nech, *supra* 7, para. 14; Servellon Garcia, *supra* 7, paras. 18 and 23; Cantuta, *supra* 7, para. 44; Huilca Tecse, *supra* 7, para. 27 and 63.

<sup>103</sup> Myrna Mack Chang, *supra* 7, paras. 21 and 25 (García Ramírez, J, sep. op.); Plan de Sánchez Massacre, *supra* 7, paras. 14-15 (García Ramírez, J, sep. op.); Id, *supra* 7, para. 14 (García Ramírez, J, sep. op.) (supplementing acquiescence with evidentiary analysis) Cavallaro & Brewer, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, 814 (2008).

<sup>104</sup> Rochela Massacre, *supra* 7, paras. 77-91 ("the Court set forth the context within which the massacre had occurred, which clearly indicated that Colombia's internal laws and policies had helped to fuel paramilitary violence.")

obtain accountability.<sup>105</sup> These changes in Court practices came from the frequent interaction between the Court and the violating States<sup>106</sup> – especially Peru, Colombia, and Guatemala. These three have a high number of cases under monitoring and various acquiescence instances. Indeed, twenty-nine of the fifty-six statements of acquiescence come from them:<sup>107</sup> Peru (10), Colombia (9), and Guatemala (10).<sup>108</sup> By determining that access to justice in the case of HR violations formed part of *jus cogens*,<sup>109</sup> the Court started to fight impunity.<sup>110</sup> However, it was through its litigation that the Court learned that there is an accepted climate of impunity in Peru, Colombia, and Guatemala.<sup>111</sup> As their cases reveal, all 3 did not comply with the obligation of prosecuting authorities.

Despite these changes in the Court’s factual analyzes, the Court members did not think they went far enough. They asked for the complete rejection of these requests and demanded (in their votes) more in-depth factual analysis of all the cases involving acquiescence.<sup>112</sup> They asked for a complete rejection since the Court is still interested in reducing its caseload.<sup>113</sup> The unilateral restriction of hearings and leaving testimonies of witnesses by the Court (without requests) justifies that concern. The Court restricts

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<sup>105</sup> Cavallaro & Brewer, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, 815 (2008).

<sup>106</sup> *Id.* at, 808-809.

<sup>107</sup> 20 States are under monitoring. The case distribution is as follows: South America (87 cases); Central America (10 cases); North America (6 cases) and Caribe (8 cases).

<sup>108</sup> See appendix A for further details.

<sup>109</sup> Burgorgue-Larsen, “War” in the Jurisprudence of the Inter- American Court of HR, 2011

<sup>110</sup> *The Velasquez-Rodriguez v. Honduras* (Merits) ICHR 29 July 1988 Ser. C. No. 4 (July) (This case was the first contentious case heard by the Court. It documents a record of numerous disappearances (1981-84) perpetrated by State agents and sponsored or tolerated by the State. In this case the Court applies the presumption of death regarding disappearances)

<sup>111</sup> 2015, *Indice Global de Impunidad IGI*, Centro de Estudios Sobre La Impunidad y Justicia (CESIJ), Colombia (75.6) at 44.

<sup>112</sup> Judge Sergio Garcia Ramirez highlights that acquiescence must be complemented with evidentiary analysis, avoiding cancellation of hearing automatically so that reparations are not dictated in a vacuum, i.e. without understanding the facts of the case. Mack Chang, *supra* 7 paras. 21 and 25 (Garcia Ramirez, J, sep. op.); *Plan de Sanchez Massacre*, *supra* 7, paras. 14 and 15 (Garcia Ramirez, J, sep. op.).

<sup>113</sup> Servellon Garcia, *supra* 7, para. 3 (Cancado Trindade, J, sep. op.).

information in 9 cases in which States have not requested.<sup>114</sup> In such instances, requests became *unnecessary* when the Court overlooked - after it accepted the acquiescence - the merits considerations and ruled on reparations directly. The Court notes the use of the streamlining when it declares that the factual controversy ceased, and States were ordered to reach an agreement for damages with the Commission within six months (often).

Concerning the streamlining and terms of acquiescence, some members of the Court in their dissenting opinion note that the Court makes a mistake in its brief discussion of the process after admitted some requests of the States associated with the acquiescence. A Court member said that the Court in an irrational urge to decide in record time, deprives itself to: leverage the positive attitude of procedural collaboration assumed by the State to make a better dossier and preliminary proceedings, apply the principle of the presence of both parties and use the acquiescence as a means of reparation for the victims' next of kin.<sup>115</sup> Therefore, the previous dissenting votes illustrate that part of the Court considers that less information about violations and violators produces damage to the legal certainty, damage to procedural equity, and damage in the quality of Court orders.

After all, at this stage, the restricted information is information about authorities' (including scapegoats or agents of low-position) involvement in the case. *Because of that restriction, States have prevented – either entirely or to some extent – further damage to their reputation that might otherwise come from being denounced in public hearings or from the fact-finding of the Court. Then, AUTHORITIES remained free from the injurious*

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<sup>114</sup> The Court restricted the proceedings once it has admitted the acquiescence in Trujillo Oroza, supra 7, paras. 40 and 43; The Mapiripan Massacre, supra.7, para. 37; The Plan Sanchez, supra.7, para. 46 (2).

<sup>115</sup> Servellon Garcia, supra 7, paras. 2 and 3 (Cancado Trindade, J, sep. op.).

*consequences that the Court proceedings entailed regarding reputation and thereby enjoyed a higher degree of legal impunity from responsibilities.* The data shows that out of 56 cases that have acquiescence, there are 25 with non-restricted information<sup>116</sup> and 31 with restricted information.<sup>117</sup>

### **C. Stage 3. Negotiation**

States know that it is not enough to control the information about AUTHORITIES on the proceedings because the Court retains the possibility to use less information or ask for additional evidence before judging. States, in consequence, start a period of negotiation to extend the control that they have acquired over the proceedings and to persuade the Court not to include in its judgment information about AUTHORITIES. States use negotiation to restrict the information in cases with authorities and without or rejected requests or to reinforce the restriction in cases with accepted requests.

States use two types of actions to control the outcomes: statement and anticipatory remedial actions (see below). This stage started with statements when requests were not used or were rejected at Stage 2. States can skip the use of these declarations and propose directly anticipatory remedial actions when the information that threatened AUTHORITIES is altered by the admission of such requests.

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<sup>116</sup> Specifically, there are **7 cases** in which States have opened the negotiation before requesting (Garrido y Baigorria, supra 8, para. 28; Myrna Mack, supra 7, para. 10; Plan Sanchez Massacre, supra 7, para. 36-38; Molina Thiessen, supra 7, para. 7; Dos Erres Massacre, supra 7, para. 1; Radilla Pacheco, supra 54, para. 57; Vargas Areco, supra 7, para. 10) since they expect the Court reduces the proceedings. **In 4 cases**, States negotiate after request since the Court rejects their requests. **In 3 cases**, States negotiate without have requested and after the oral proceedings have closed (Gomez Palominos, supra 7; Huilca-Tecse, supra 7, para. 44; Blanco Romero, supra 27) since the critical information came to light against AUTHORITIES. In the **11 remaining**, States negotiate since they have not requested before.

<sup>117</sup> The 31 cases are composed of 22 cases in which States have acquiesced and requested (the restriction of information) with success and 9 additional cases in which the Court has restricted information without requests.

## **Actions of the States**

There are two statements, statements of limited responsibility and non-intervention. In 38 cases, there are State statements, 21 of limited responsibility<sup>118</sup> and 17 of non-intervention.<sup>119</sup> Moreover, there are two broad categories of anticipated remediation those that consider individual and general obligations. Both described in Chapter 2, Section B. There are in 48 cases, in which 14 anticipatory remedial actions are individual,<sup>120</sup> 12 general,<sup>121</sup> and 22 include both.<sup>122</sup> The judicial obligation is a general obligation categorized as a promise since States are not working in correcting the violation.

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<sup>118</sup> Albán Cornejo, *supra* 7, para. 10, 11; Baldeón-García, *supra* 7, para. 20; Blake, *supra* 8, para. 27; Cantoral-Huamaní and García-Santa Cruz, *supra* 7, para. 5, 20; Escué Zapata v. Colombia (Interpretation of Merits, Reparations and Costs) ICHR, 5 May 2008, Ser. C No. 178, para. 6; Kimel, *supra* 7, para. 18; Maritza Urrutia, *supra* 43, paras. 6, 29; Ximenes-Lopes, *supra* 7, para. 36.

<sup>119</sup> El Amparo, *supra* 8, para. 19; Benavides-Cevallos, *supra* 7, para. 54; Blanco Romero, *supra* 7, paras. 27, 31; Caballero Delgado and Santana v. Colombia (Reparations and Costs) ICHR, 29 January 1997, Ser. C No. 22, para. 23; Garrido y Baigorria, *supra* 8, para. 24; Gutiérrez Soler, *supra* 7, para. 26; Huilca-Tecse, *supra* 7, para. 20; Molina-Theissen, *supra* 7, paras. 7, 22; Tiu Tojín, *supra* 7, para. 12; Vargas-Areco, *supra* 7, para. 10.

<sup>120</sup> Ticona Estrada, *supra* 7; Ibsen Cardenas, *supra* 7; Trujillo Orozca, *supra* 7; Valle Jaramillo, *supra* 7; Tiu Tojin, *supra* 7; Juvenile Reeducation Institute, *supra* 7; Cantoral-Huamani, *supra* 7; La Cantura, *supra* 7; Miguel Castro-Castro, *supra* 7; Cantoral Benavidez, *supra* 11; Montero Aranguren, *supra* 7; Escue, *supra* 7; Kawas, *supra* 7; Servellon Garcia, *supra* 7.

<sup>121</sup> Kimel, *supra* 7; Ximenes Lopes, *supra* 7; Palamara, *supra* 11; Almonacid Arellano v. Chile (Merits, Reparations and Costs) ICHR, 26 September 2006, Ser. C No. 154; Las Palmeras, *supra* 7; Ticona, *supra* 7; Zambrano Velez, *supra* 7; Chaparro Alvarez, *supra* 7; Carpio Nicolle, *supra* 7; Fernandez Ortega, *supra* 7; Rosendo Cantu, *supra* 7; Velez Loor, *supra* 7; Goiburu, *supra* 7; Cantoral Huamani, *supra* 7; La Cantuta, *supra* 7.

<sup>122</sup> Gutierrez Soler, *supra* 7; Bulacio, *supra* 7; Garrido, *supra* 8; Rochela Massacre, *supra* 7; Ituango Massacre, *supra* 7; Benavidez Cevallos, *supra* 7; Blake, *supra* 8; Bamaca, *supra* 27; Myrna Mack, *supra* 7; Plan Sanchez Massacre, *supra* 7; Molina Thiessen, *supra* 7; Dos Erres Massacre, *supra* 7; Chitay Nech, *supra* 7; Campo Algodonero, *supra* 7; Radilla Pacheco, *supra* 54; Xakmok Kasek, *supra* 41; Vargas Areco, *supra* 7; Barrios Altos, *supra* 7; Gomez Palominos, *supra* 7; Huilca Tecse, *supra* 7; Amparo, *supra* 8; Blanco Romero, *supra* 47.

*a) State statements*

There are statements in 38 cases (21 on limited responsibility<sup>123</sup> - and 17 non-intervention<sup>124</sup>). The State statements include proclamations of limited responsibility and assertions against Court intervention.

**1) Statements of limited responsibility**

Statements of limited responsibility are presented considering that the culpability of AUTHORITIES can result from the act of acquiescence – and, even worse, acquiescence can be used to extend their responsibility on broader issues or similar cases. States avoid setting themselves up as a precedent for new claims, and they recall the Court (after acquiescence and before the issuance of the judgment) that the merits of the case require being limited to cover the effects of the admitted actions solely. The right of the State to assure that the Court manages the information against AUTHORITIES with limitations originated in that acquiescence is considered by the Court as a step toward the progress of the case (see Stage 1 on praises of the Court) that legitimized *all* State actions during the proceedings.

Regarding the reaction of the Court to these statements, the Court seems to believe in a good faith discourse. In consequence, the Court mitigates the rigor of a future obligation without fully realizing that an explicit declaration of responsibility is a tool

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<sup>123</sup> Albán Cornejo, *supra* 7 para. 10, 11; Baldeón-García, *supra* 7, para. 20; Blake, *supra* 8, para. 27; Cantoral-Huamaní and García-Santa Cruz, *supra* 7 paras. 5, 20; Escué Zapata v. Colombia (Interpretation of Merits, Reparations and Costs) ICHR, 5 May 2008, Ser. C No. 178, para. 6; Kimel, *supra* 7, para. 18; Maritza Urrutia, *supra* 43, paras. 6, 29; Ximenes-Lopes, *supra* 7, para. 36.

<sup>124</sup> El Amparo, *supra* 8, para. 19; Benavides-Cevallos, *supra* 7, para. 54; Blanco Romero, *supra* 7, paras. 27, 31; Caballero Delgado and Santana v. Colombia (Reparations and Costs) ICHR, 29 January 1997, Ser. C No. 22, para. 23; Garrido y Baigorria, *supra* 8 para. 24; Gutiérrez Soler, *supra* 7, para. 26; Huilca-Tecse, *supra* 7, para. 20; Molina-Theissen, *supra* 7, paras. 7, 22; Tiu Tojín, *supra* 7, para. 12; Vargas-Areco, *supra* 7, para. 10.

States employ to control outcomes.<sup>125</sup> Under this understanding, the Court will show confidence in a clear statement that limits previous declarations of acquiescence, for instance, noting that these acquiesced violations are not part of a pattern of HR violations<sup>126</sup> or violence,<sup>127</sup> including paramilitary, promoted by State policies.<sup>128</sup>

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<sup>125</sup> In 38 out of 56 cases, there is partial acquiescence. In the majority of these cases, States acquiesce by justice's violations i.e., by the violations of Articles 8 and/or 25 in connection with 1.1, of the Convention. These justice's violations relate to the order to prosecute authorities. The data shows that out of 234 justice violations, 101 were acquiesced. In general, States' failure to prosecute HR violators and complied with only 4% of obligations that related with acquiesce of justice violations, but this inaction is even more visible after States have made an explicit declaration of limitation responsibility. Of the 514 violations categorized: as I noted 234 violations of justice violations, of which 101 were accepted. The remaining is comprised by 196 violations of physical integrity, of which 88 were accepted; 49 violations of political and civil rights, of which 18 were accepted; 35 violations of privacy and property, of which 10 were accepted. There is no trace of acquiescence for social, economic or cultural violations.

I made a comparison between the complied obligations that registered partial acquiescence and those that have registered total acquiescence. Of the sample, 32% of obligations with partial acquiescence are complied, while 42% of obligations with full compliance are complied. The difference could be explained since the average obligation for those accepted with partial is lesser than those that registered total compliance (5 obligations v. 6) on average. Articles 8 and 25 in relation to 1.1. are also the common violations accepted in cases with full acquiescence, however, articles 4 and 7 of physical integrity category are additionally preferred.

<sup>126</sup> Honduras rejects the existence of "systemic" abuses. *Kawas-Fernández*, supra 7, para. 19 (it emphasized the absence of "broad pattern of violence against human rights defenders") and *López-Álvarez*, supra 30, para. 57 (it denied that the role of community leader of the victim was the reason for being murdered). The same in *Río Negro Massacres v. Guatemala* (Preliminary Objection, Merits, Reparations, and Costs) ICHR, 4 September 2012. Ser. C No. 250, para. 18.

<sup>127</sup> Honduras acquiesced in *Servellón-García* and *Kawas* cases, but it contends that State forces are not or only liable for violence against street children in isolated incidents. *Servellón García*, supra 7, para. 3 (*Cancado Trindade*, J, sep. op.) ("the terms of the acknowledgment of the State's responsibility [...] expressly excludes "the existence of a context of alleged systematic violence of human rights, both tolerated and consented" by the State (para. 16 and 54)"). *Kawas-Fernández*, supra 7, paras. 8, 18-9 (Honduras used a statement to leave clear that its early acquiescence cannot be extended beyond its original terms. The statement denies that it had violated the deceased's right to life, her right to freedom of association, and her next of kin's right to humane treatment. Honduras seeks to avoid set its declarations on a precedent for at least five environmental activists murdered during the decade that followed the death of Blanca Jeannette Kawas Fernandez (claims of other victims) by rejecting "the impunity in the *Kawas* case generated a context of violence against environmentalists.") Similar it is visible in *Escue Zapata*, supra 7, paras. 11 and 12.

<sup>128</sup> *The Pueblo Bello Massacre v. Colombia* (Merits, Reparations, and Costs) ICHR, 31 January 2006, Ser. C No. 140, paras. 121 and 132 (Colombia asserted that the American Convention cannot be unacceptable burden since for the State it is impossible to guarantee nonoccurrence of HR violations since it needed to prioritizing public safety); *Las Palmeras v. Colombia* (Monitoring) ICHR, 4 August 2008, para. 20 and (Preliminary Objections) ICHR, 4 February 2000, Ser. C No. 67, para. 2 (Colombia claimed its impossibility to fulfill the Court obligation to locate remains of victims since "entering [in] the area became impossible due to severe disturbances of public order in the region." It is a declaration questionable since the proceedings demonstrated that the State attempted to cover State forces implicated in the abuse (operation palermo) up by dressing the victims in uniforms so that the

## 2) Nonintervention Statements

By nonintervention statements, States settled on language that includes justifying the abuse, blaming and deflecting responsibility onto others and critiquing and impugning victim or witnesses and the Court. States questioned the authority of the Court through a rationalist discourse. States expect that the Court respect the nonintervention and sovereignty principles avoiding the issuance of judgments that overreach their exclusive right to prosecute AUTHORITIES. It is feasible that acquiescence along with nonintervention statement is an overlapped way of stating that sovereignty allows States to do, as they want and if they wish to protect their agents, they will. In this way, this statement reminds the Court that its intrusiveness can justify noncompliance. This statement is, of course, inconsistent with the sacrifice of sovereignty that States made by ratifying the Convention and acceptance of the Court's jurisdiction (as explained in Chapter 1).<sup>129</sup>

Advancing in some illustrations, Panama's executive asserted that the Court made the obligations dependent on "non-existent and therefore inapplicable Panamanian domestic law" and emphasized that the Court has no jurisdiction to intervene in its domestic legal system nor to monitor competence.<sup>130</sup> Honduras declared that internal procedures and rules prevail over the Court's judgments.<sup>131</sup> Trinidad and Tobago denounced the Court jurisdiction since the Court has no right to decide on the capital

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event was viewed as a legitimate military operation against paramilitaries. The same pattern in Rochela Massacre, *supra* 7, para. 70.

<sup>129</sup> Kali Wright-Smith, *The decision to comply: Patterns of compliance with the Inter-American Court of Human Rights* (2011) PURDUE UNIVERSITY).

<sup>130</sup> Baena, *supra* 9, para. 54 a); Baena (Competence) ICHR, 28 November 2003, Ser. C No. 104, (November 28, 2003), para. 26.

<sup>131</sup> Servellon, *supra* note 106; Kawas, *supra* note 107.



punishment.<sup>132</sup> Barbados stated that the capital punishment is an affair unquestionable by the Court given its reservation, moreover, capital punishment, as a rule, reflects the decision of its people, and this is beyond question by the Court.<sup>133</sup>

Peru and Venezuela accused the Court of violating the principle of non-intervention by alluding to judgments by its domestic Courts. These State statements contributed to a strategy to retract acquiescence. In short, Peru claimed that the power to sanction AUTHORITIES resided only in their national courts.<sup>134</sup> In *Huilca Tecse* case, Peru informed that the agreement, signed for acquiescence, “[..i]mplied interference by the Executive Power and violation of the independence and autonomy of autonomous Constitutional bodies.”<sup>135</sup> In *Castillo Petruzzi*, Peru held that the Court’s order<sup>136</sup> usurps the State’s right to release criminals<sup>137</sup> and violates the State’s sovereignty to withdraw recognition of the Court’s competency.<sup>138</sup> In the *Loayza Tamayo*,<sup>139</sup> *Castillo Petruzzi* and the *Tribunal Constitutional* cases, the Peruvian Supreme Court of Military Justice

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<sup>132</sup> Inter-American Court of Human Rights, General Information of the Treaty: B-32, American Convention, Trinidad and Tobago: Denunciation notified May 26, 1998. (Note that the original text of the denouncement has been abridged “[t]he death penalty is the punishment for the crime of murder in Trinidad and Tobago, [...] [Consequently] the State of Trinidad and Tobago hereby gives notice to the Secretary-General of the Organization of American States of the withdrawal of its ratification of the American Convention on Human Rights.”)

<sup>133</sup> *Boyce v. Barbados* (Objection, Merits, Reparations and Costs) ICHR, 20 November 2007, Ser. C No. 169, para. 166.

<sup>134</sup> *Constitutional Court v. Peru* (Merits, Reparations and Costs), ICHR, 31 January 2001, Ser. C, No 71, para. 47; *Cantoral Benavides*, supra 11, para. 46; *La Cantuta*, supra 7, para. 156.

<sup>135</sup> *Huilca-Tecse*, supra 64, para. 30, 32

<sup>136</sup> *Castillo Petruzzi v Perú*, Merits, Reparations and Cost, Inter-Am. Ct. H.R. (ser. C) No. 52, (May 30, 1999), at 67, Ratio Decidendi clause 14

<sup>137</sup> *Id.*, para. 216 (f)

<sup>138</sup> *Id.*, supra 26, at 24, par. 100 (a) (Sept. 4, 1998) (Peru’s assertion that “the sovereign of the legal organs of Peru cannot be modified much less rendered ineffective by any national, foreign, or international authority”)

<sup>139</sup> *Loayza Tamayo v. Perú*, Compliance with Judgment, Inter-Am. Ct. H.R. (ser. C) No. 60, (Nov. 17, 1999), at 3-4, par. 9. *Loayza Tamayo v Perú*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 33, (Sept. 17, 1997), at 2, par. 3 a) - f)

said the ICHR's decisions are unenforceable.<sup>140</sup> In *Ivcher Bronstein* and the Tribunal Constitucional, withdrawing its acquiescence of the Court's jurisdiction, the State denounced the Convention on July 8, 1999. The ICHR ruled that States cannot withdraw from its jurisdiction and remain a party to the Convention. Consequently, Peru revoked its withdrawal on January 29, 2001.

Venezuela stated that the Court has no right to usurp the functions of domestic Courts.<sup>141</sup> The nonintervention statements resulting from Venezuela are two. In *Montero Aranguren* case, the State after an eloquent acquiescence, State's refusal to acknowledge the validity of the pre-existing friendly agreement producing a retraction of acquiescence after the issuance of the 2006 judgment.<sup>142</sup> In *Apitz, Barbera (Venezuela)* case, Venezuela claimed systematic persecution and violation of sovereignty by the ICHR's order to reinstate three disbarred national judges. The Constitutional Court of Venezuela declares the judgment "unenforceable"<sup>143</sup> by citing the *Castillo Petruzzi* case (from Peru). The Venezuela Court urged the Executive to denounce the Convention by the "usurpation of functions"<sup>144</sup>(of the national assembly and electoral council) as if were a colonial power, by trying to impose political judgments and ideologies on a sovereign and independent nation incompatible with its constitutional system, and representing US

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<sup>140</sup> *Castillo Petruzzi v Perú*, Objections, Inter-Am. Ct. H.R. (ser. C) No. 41, (Sept. 4, 1998), at 24, par. 100 (a)

<sup>141</sup> Regarding the Case No. 08-1572, the Supreme Court of Justice, Constitutional Chamber, declared: On December 4, 2008, the Inter-American Court of Human Rights judgment dated August 5, 2008, which ordered reinstatement of former judges of the First Court of Administrative Disputes, among other reparations, was submitted for interpretation. The Venezuelan Court declared the Inter-American Court of Human Rights judgment "unenforceable" and requested that the "Executive denounce the Convention in light of the obvious usurpation of powers committed by the Court [...]."

<sup>142</sup> *Montero Aranguren*, supra 78 para. 57-58. See *Montero Aranguren v. Venezuela*, No. 11.699, Demanda, paras. 17, 23 (IACHR)

<sup>143</sup> Case No. 08-1572, the Supreme Court of Justice, Constitutional Chamber, declared: the Inter-American Court of Human Rights judgment "unenforceable."

<sup>144</sup> Case No. 08-1572, the Supreme Court of Justice, Constitutional Chamber, requested that the "Executive denounce the Convention in light of the obvious usurpation of powers committed by the Court [...]."

interests.<sup>145</sup> No material benefit from compliance exists for Venezuela.<sup>146</sup> Thus, after openly questioning the needs of the ICHR,<sup>147</sup> the Convention was denounced on September 10, 2012, and self-marginalized from the Inter-American HR System. Examples of nonintervention statements came also from Argentina,<sup>148</sup> Colombia,<sup>149</sup> and Brazil.<sup>150</sup>

Regarding these statements, the Court could act consistently with the declared State interests. However, usually, the ICHR continues the issuance of rulings that require actions against AUTHORITIES. In this way, the Court seems (at first glance) to ignore these statements since it refuses to settle for limited or soft judgments.

### **3) The use of statements**

There is a tendency to use both statements after acquiescence and within the monitoring of initial actions. In fact, 67% out of 56 cases with acquiescence contains one of these two State statements. By using these statements States attempt to control the proceedings and outcome under the logic of preserving areas of power they believe theirs. Thus, it is not shocking that the discourse used on these two types of declarations points poses a threat or a weak normative commitment that leaves the content of the given

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<sup>145</sup> Doug Cassel, will Chavez remove Venezuela from the Inter-American Commission? *Opinio Juris* (blog), 11 may 2012, at <http://opiniojuris.org/2012/05/11/chavez-removes-venezuela-from-iachr> (this is the latest move in the Bolivarian Republic's long record of denouncing the Commission and [the Court] as tools of US imperialism...)

<sup>146</sup> *Id.*

<sup>147</sup> In March 2013, the Venezuelan government was again campaigning to weaken the IACHR and ICHR by threatening to pull out of the HRS if their modifications are not accepted. the CEJIL notes: [T]he [Venezuelan] government has consistently taken an antagonistic position with regard to the Inter-American System, has openly questioned the need to comply with the decisions of the Commission and Court, and has failed to guarantee protection for human rights defenders, some of whom are protected by precautionary and provisional measures, among others. *Cejil, Activities Report 2003-2004*, at 67, available at <<http://www.cejil.org/labores.cfm>>

<sup>148</sup> Garrido and Baigorria, *supra* 66, para. 34

<sup>149</sup> *Caballero Delgado and Santana v. Colombia* (Merits) ICHR, 8 December 1995, Ser. C No. 22, para. 27

<sup>150</sup> Ximenes Lopes, *supra* 31, para. 63 e)

acquiescence without substance. Acquiescence becomes a concept devoid of meaning since these statements obstruct the legal force of HR claims throughout the System<sup>151</sup> since States seem to assume the violation, but under the supposition that they will handle the abuse internationally. Thereby, there is predictably a low rate of compliance. From the start, a State can be perceived as illegitimate. In addition, the prior suggestion finds support in the data in which the rate of compliance is 21%, thus, ostensibly lesser than the remaining cases.

The previous discussion reiterates that a statement of the State is an option to temper the rigor of a judicial obligation to the extent that it puts limitations on the deliberations of the Court. States still retain the possibility to further action by repairing before the issuance of a decision on merits. Thus, the process of negotiation can continue or start with another action. Often, the next step for States is to propose anticipatory remedial actions.

***b) Anticipatory remedial actions (hence ARA)***

Anticipatory remedial actions are unilateral or bilateral, binding commitments of the State given in advance of issuance of the judgment for controlling the intensity of future obligations (see details in Chapter 2). On the one hand, these actions may serve to counteract some reputational damage during the proceedings. On the other hand, they try to mitigate the issuance of judicial obligations directed to investigate the responsibility of AUTHORITIES. States hope the Court rewards their anticipated remediation by reducing the cost for AUTHORITIES at the time, which will judge the case. The remediation may

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<sup>151</sup> Wright-Smith, The decision to comply: Patterns of compliance with the Inter-American Court of Human Rights 202. 2011.

happen since the Court's jurisprudence is consistent so as to allow the States to calculate, more or less certainly, the type of demands that the Court pronounces.<sup>152</sup>

There are variety of anticipatory remedial such as in Kimel (Argentina) case that shows how the Court reacts before symbolic measure. The Court has "highly" valued that the President led a public ceremony of acquiescence in the presence of more than six ministers, the victim's family and the press.<sup>153</sup> Court has not called for public hearings like in other cases it did frequently to condemn that the State had not complied with the judicial obligation to nullify the victim's sentence.<sup>154</sup>

Table 1 shows the number and compliance in cases in which there is an ARA. The compliance of ARA obligations is compared with all of these instances. The table also shows compliance of cases in which there was not an ARA. The table is confined to illustrate those 56 cases with acquiescence in where States have proposed an ARA (see table 1).

**Table No. 2**

		# Of cases	% Of compliance of ARA obligations	Overall compliance in those cases where there is an ARA	Overall compliance in those cases where there is NOT an ARA
<b>56 cases with acquiescence</b>	44 with authorities	38 with ARA	64.43%	29.3%	-
		6 without ARA	-	-	12.8%
	12 without authorities	10 with ARA	60.3%	26.9%	-
		2 without ARA	-	-	30%

Based on analyzed data, States are more enthusiastic to comply with obligations that they have chosen for themselves or with which they agree to negotiate than those imposed unilaterally by the Court. In fact, in the opposite direction of the presented results that reveal that acquiescence does not increase compliance nor does it lead to a

<sup>152</sup> Pasqualucci, The practice and procedure of the Inter-American Court of Human Rights 308. 2013.

<sup>153</sup> Kimel v. Argentina (Monitoring), ICHR, 15 November 2010, considering paras. 14-17

<sup>154</sup> Id., paras. 11-13.

shorter and easier monitoring; **anticipatory remedial actions always have a positive impact on the compliance patterns.**

The dissertation data suggests that when we restrict our attention only to cases with acquiescence in which there are anticipatory remedial actions, the rate of compliance increases eight points – to 29% (of the overall rate of 21%). Moreover, when there is a restriction to observe anticipatory remedial actions solely and those obligations ordered by the Court are discounted;<sup>155</sup> the compliance rate exceeds 64,43%.

Furthermore, States seem also highly predisposed to a prompt compliance with their anticipatory remedial requirements. Indeed, States implement these remedies either before the issuance of a judgment or within the 12 months on average from the issuance date of the Judgment on Reparations. This finding is impressive since since States generally implement Court obligations within 45 months (as shown in Part II). Thus, the excessive time that each case is under monitoring came from those duties ordered by the Court.

Regarding the reaction of the Court to these remedial actions, recall that the Court takes on two roles that affect judgment compliance.<sup>156</sup> The judicial role based on the Court's issuance of decisions, and the political role based on the Court's performance in monitoring, as noted in Chapter 1. The Court considers the proposed remedy under its judicial function. The analysis also suggests that since proposals of anticipated remediation are submitted before the Court has issued its judgments, the Court is in an

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<sup>155</sup> I also discounting Peruvian anticipatory remedial actions since Peru systematically offers anticipatory actions doing nothing then or withdraw them. Add Peru cases with remedial and without compliance

<sup>156</sup> Baena, *supra* 9, para. 68

excellent position to incentivize these proposals.<sup>157</sup> At the time they were proposed, the monitoring is still not opened. Moreover, the political role of the Court is also anticipated since these proposals increase chances to negotiate forms of compliance. In this way, a positive or negative reaction of the Court to face these proposals would be decisive to determine the use of them. A positive appraisal would confirm the view that the Court trusts that an anticipatory remedial action “is a sign of *true* advancement of HR.”<sup>158</sup> The prior suggestion finds support in the data in which the Court adamantly praises those (remedial) that are symbolic<sup>159</sup> like written,<sup>160</sup> oral or public<sup>161</sup> apologies presented in hearings, moments of silence commemorating the victims, apologies for suffering, condolences<sup>162</sup> and respect.<sup>163</sup>

By reinforcing the previous actions (of Stages 1 and 2) with statements and anticipatory remedial actions of this Stage, States makes the proceedings more

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<sup>157</sup> The Court can leverage that a high number of violated articles leads States to make concessions to victims and comply with the anticipatory remedial action (%). And, that, according my results, low-rights context leads States to use the anticipatory remedial action as a means to avoid fully complying with the judgment, thus, the use of anticipate remedial should be preferred in low-rights context; however, some States prefer to negotiate even in high rights contexts since concession/remedial provides a positive image to States. This support the idea that a concern by reputation is always present in the State behavior and the role of the Court in manages the remedial can be fundamental.

<sup>158</sup> Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights* 307. 2013.

<sup>159</sup> There are 15 "symbolic" actions distributed among individual obligations. Also, symbolic actions were included in 22 agreements on reparation *El Amparo*, supra 8, para. 19; *Benavides-Cevallos*, supra 7, paras. 27, 35; *Huilca-Tecse*, supra 7, para. 44; *Kimel*, supra 7, para, 22; *Molina-Theissen*, supra 7, paras. 7, 10, and 36; *Tiu Tojín*, supra 7, para. 5; *Maritza Urrutia*, supra 43, para.30; *Vargas-Areco*, supra 7, para. 10 and 46; *Ximenes Lopes*, supra 7, para. 76.

<sup>160</sup> *Trujillo Oroza*, supra 7, para. 37 (Bolivia voluntarily accepted international responsibility for the disappearance of the victim and informed the Court in the public hearing that it had sent a written apologize to the victim's family.)

<sup>161</sup> Peru volunteered to publicly apologize to the victims in the *Duran and Ugarte v. Peru* (Reparations and Costs), ICHR, 3 December 2001, Ser. C, No. 89, para 39 (b) and *Barrios Altos v. Peru*, supra 7, para. 38.

<sup>162</sup> In the public hearing before the Court, Guatemala expressed “its profound condolences for the acts lived and suffered by the community of Plan de Sanchez [and asked] the pardon of the victims [...] as a first sign of respect, reparation and the guarantee of non-repetition.” *Plan Sanchez Masacre at al.* supra 7, para. 38

<sup>163</sup> Colombia, during a public hearing before the Court, expressed “its deep respect and sympathy for the victims of the acts that took place in Mariparan in July 1997, and it evoke[d] their memory to States its regret and to apologize to their next of and to Colombian society.” *Mapiripan Massacre*, supra 7, para. 314.

predictable. In advance, we know that the central objective of States is to control the outcome of the trial, to achieve it – States need influence the deliberations of the Court. The way in which the Court reacts to different State actions carried out during the first three stages suggests that State proposals are an opportunity to address and resolve HR violations within a dialogic process of discussion in a good-faith context. *Indeed, from my analysis, it is possible to assert that the Court sets in relevant consideration all those proposals by which States have voluntarily expressed some commitment, even more than concrete actions. In fact, focusing on those 44 (out of 56) cases that have acquiescence along with AUTHORITIES, 4 end without judicial obligation,<sup>164</sup> 14 with judicial obligation but without information about AUTHORITIES. The answer in these 18 cases is positive due to the Court mitigating the rigor of its rulings.<sup>165</sup> However, the remaining 26 have judicial obligation and information on AUTHORITIES. These 26 cases imply that the Court refuses to settle for soft judgments and has ignored State interests.*

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<sup>164</sup> Dismissed Congressional Employees, supra. 39 and Ricardo Canese. v. Paraguay, supra. 30.

<sup>165</sup> *It is important to take into consideration that the Court in 6 additional cases ordered to prosecute domestically the criminal responsibility, but not the institutional, administrative, disciplinary or civil responsibilities. (see Myrna Mack v. Guatemala, paras. 271-275 and considering 5; Dos Erres v. Guatemala, paras. 231-236 and considering 8 and 9; Servellon v Honduras, paras. 192-196, considering 8; Radilla v. Mexico, paras. 329-334, considering 8; Goiburú v. Paraguay, paras. 123-132 and 164-166, considering 5; La Cantuta v. Peru, paras. 224-228 and considering 9.) Thus, AUTHORITIES can retain their positions without paid pecuniary for their responsibilities. In consequence, the rigor of the judicial obligation increases when there is not acquiescence. For instance, in the Garibaldi (Brazil) case, there is no acquiescence and the intensity applied by the Court in its obligation to prosecute was extended to functional misconduct: “the State must investigate [also] and, if appropriate, punish possible functional misconduct committed by the public officials in charge of the investigation.” (See Garibaldi v. Brazil, Judgment of September 23, 2009, (Objections, Merits, Reparations, and Costs) para. 169). Moreover, the Court emphasized concerning these public officials “whether they be police agents, members of the Public Prosecutor’s Office, judges or general public officials.” (see Id., para. 169).*



#### **D. Stage 4. Monitoring**

Stage 3 concludes the adjudication process, in stage 4 the monitoring process begins (after the issuance of judgments). From the beginning States know that intense monitoring may be costly for AUTHORITIES and that when they acquiesced, the Court would reward them with later and less severe (in frequency and number) monitoring actions than when they do not acquiesce, as it explained in Part II. The use of demands for compliance is, for example, postponed within this diminished control.

States can leverage this diminished monitoring in the 26 acquiescence cases where AUTHORITIES were not protected from Court-recognized culpability for HR violations suffer a damaged reputation and are exposed to judicial prosecution. States, in consequence, use two types of actions to bar the prosecution of their AUTHORITIES. First, States take the (costless) step of complying, albeit slowly, with those obligations that do not involve AUTHORITIES (or non-judicial obligations). Secondly, they attempt to exonerate the authority of guilt and to block the prosecution.

##### **1. Court actions**

###### ***a) Diminished monitoring as reward***

The Court could act pragmatically at the moment to decide to monitor compliance and control intensely States that have acquiesced. However, the Court decides that only States that have *not* acquiesced will be monitored intensely with early demands for compliance. The Court undercuts the method of control when it favors States that exhibit acquiescence. The data provides evidence that the Court rewards States that have acquiesced with diminished monitoring. The issuance and frequency of the monitoring

judgments differentiate from a diminished control. Table 2 notes the data on these actions on cases without and with acquiescence.

**Table No. 3**

Criteria	Type of Cases	Time/Frequency/Number	# Of cases without and with acquiescence
<b>1<sup>st</sup> Monitoring Judgment</b>	Non-acquiescence	1 year and 9 months or less	38 of 62
	Acquiescence	3 years and 3 months or more than 3,3	37 of 56
<b>Frequency monitoring</b>	Non-acquiescence	Every 1 year and 6 months or less	38 of 62
	Acquiescence	Every 2 years and 6 months or more than this	37 of 56
<b>Number of monitoring</b>	Non-acquiescence	5 or more than 5 monitoring judgments	40 of 62
	Acquiescence	3 or less monitoring judgments	43 of 56

A reason to diminish monitoring actions in acquiescence cases is that the Court concludes that it cannot demand too much of States that, even in the absence of enforcement mechanism, have voluntarily assumed a commitment to their statements of acquiescence. The Court also believes that States that have acquiesced intend to monitor their actions and obligations in good faith. Consequently, the Court expects that these States translate their acquiescence into a “prompt and effective compliance”<sup>166</sup> with Court obligations. Based on this presumption, the Court sees that acquiescence economizes the costly processing volume of requests to enforce judgments.<sup>167</sup>

A diminished monitoring would affect the amount of compliance, as was discussed earlier, and is also corroborated by the fact that States move toward compliance during the first eighteen months of monitoring.<sup>168</sup> Thus, if monitoring starts after three

<sup>166</sup> Montero Aranguren, *supra* 6, para. 7

<sup>167</sup> *Supra*, 71

<sup>168</sup> When we compare compliance levels for States that began monitoring after 18 months with those that began after 60 months, States move toward compliance on 60% of its obligations within the first 18 months. When monitoring begins belatedly, States achieved an equivalent percentage, but took twice as long as those monitored within 18 months. It is important to harness the momentum that follows the judgment on reparations and costs since compliance becomes slow and long when the

years on average (see table 2) producing timely compliance is an almost impossible task. Indeed, cases with acquiescence for which monitoring began between 63-74 months had been open for 18 years as of 2010.<sup>169</sup>

Thus, when the monitoring starts late, the Court actions to control compliance and counteract noncompliance also applies late. In effect, the discourse of the Court is weak if it is used in the process of diminished monitoring and after concrete actions - such as the preparation of means to exonerate AUTHORITIES of guilt and obstacles of law to face prosecution – uncovered the goal of the State to give protection to their high AUTHORITIES.

***b) Demands for compliance as punishment***

The Court uses demands for compliance as threats to convince and direct the State to comply, particularly, with judicial obligation. The Court appeals to commitments, values, and ideals of States toward the Inter-American HR System. The Court idealistically again expects (as it showed in previous stages) that States that signal commitments by acquiescence would be inclined to respond to reputational messages in which their “underperform” is naming and shaming. Indeed, these demands mention the use, meaning, and time elapsed between acquiescence and noncompliance. Accordingly,

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Court allows the opportunity to pass. According to my compliance records for the 37 reported obligations that were first monitored within 18 months and the 14 that were first monitored after 60 months the tendency is as follows: For obligations that were monitored before eighteen months, the compliance rate is 19%, the noncompliance rate is 38% and the rate of unresolved issues of compliance (that registered some steps toward compliance) is 43%. For those that were monitored after 60 months, the compliance rate is 21%, the noncompliance rate is 37% and the rate of unresolved issues of compliance is 42%. The cases and countries that were monitored within 18 months are: Huilca Tecse and Durand Ugarte, from Peru (18 and 11, respectively), Aptiz from Venezuela (16 months), Hilarie from Trinidad (17 months), Serrano Sisters from El Salvador (18 months) and Baena from Panama (16 months). The cases and countries for which monitoring began later are listed in the following footnote.

The cases and countries that were monitored after 60 months are: Neira Alegria from Peru (74 months), El Amparo from Venezuela (74 months), Caballero Delgado from Colombia (70 months), Benavides Cevallos from Ecuador (65 months) and Garrido from Argentina (63 months)

they seek to push States to comply by recalling, "State acknowledgment of international responsibility must translate into a prompt and effective compliance."<sup>170</sup> Moreover, the Court stresses that "the real symbolic value that the [acquiescence] has as a guarantee of non-repetition of such serious facts in the future."<sup>171</sup> Further, the Court emphasizes the value of acquiescence as "remedy"<sup>172</sup> that benefits the victims *per se*.

For example, in cases like *Molina Theissen*, *Tiu Tojín*, *El Amparo* and *Montero Aranguren*, the Court said: "[...]he initial reparative value that acknowledgment may have for the victims and their next-of-kin fades as time goes by if the State authorities fail to take action and do not repair the damage caused."<sup>173</sup>

Particularly for judicial obligations, in *Vargas Areco*, the Court states "become apparent that more than 20 years after the extrajudicial execution of the child *Vargas Areco* and four years after the notification of the Judgment under supervision, there has been no progress with the implementation [...]"<sup>174</sup>

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<sup>170</sup> *Trujillo Oroza*, supra 56 para.51; *Mapiripán Massacre v. Colombia (Monitoring)* ICHR, 08 July 2009, para. Considering 4; *Gutiérrez Soler v. Colombia (Monitoring)* ICHR, 30 June 2009, considering 4; *Theissen v. Guatemala (Monitoring)* ICHR, 16 November 2009, para. 18; *Tiu Tojín v. Guatemala (Monitoring)* ICHR, 16 May 2011, para. 11; *Cantoral Huamaní and García Santa Cruz v. Peru (Monitoring)* ICHR, 28 April 2009, para. 7; et al, supra 6, para. 7; *El Amparo*, supra 44, paras.13-4; *Blanco Romero v. Venezuela (Monitoring)* ICHR, 22 November 2011, paras. 40 (1).

<sup>171</sup> *Case of Montero Aranguren*, supra 6, Considering Clause 7; *Case of Molina Theissen*, Id. Considering Clause 18; *Case of Tiu Tojín*, Id. Considering Clause 11; and *Case of El Amparo*, Id. Considering Clause 4. In addition, see *Gutiérrez Soler*, supra 7, para. 26 No5 (5. Understands that this acknowledgment of liability is in itself an act of satisfaction towards the victim and his next of kin.) and para. 92 (b) ([...]The State requests that the acknowledgement of liability pronounced at the seat of the Court be deemed an act of public apology [...])

<sup>172</sup> *Case of Montero Aranguren*, supra 6, Considering Clause 7; *Case of Molina Theissen*, Id. Considering Clause 18; *Case of Tiu Tojín*, Id. Considering Clause 11; and *Case of El Amparo*, supra 8, Considering Clause 4. In addition, see *Gutiérrez Soler*, supra 7, para. 26 No5 (5. Understands that this acknowledgment of liability is in itself an act of satisfaction towards the victim and his next of kin.) and para. 92 (b) ([...]The State requests that the acknowledgement of liability pronounced at the seat of the Court be deemed an act of public apology [...])

<sup>173</sup> *Montero Aranguren*, supra 142 Considering Clause 7; *Molina Theissen*, supra 163, Considering Clause 18; *Case of Tiu Tojín v. Guatemala (Monitoring)* 16 May 2011, Considering Clause 11; and *El Amparo*, supra 162 Considering Clause 4.

<sup>174</sup> *Vargas Areco v. Paraguay (Monitoring)*, ICHR, 24 November 2010, para 9

The analyzed data shows that there are no meaningful changes in the behavior of States toward compliance, after the issuance of demands for compliance. Specifically, 77% of those cases with acquiescence - in which demand for compliance was used - are stalled in unresolved issues of compliance. It is unnecessary to distinguish between cases with or without acquiescence since in both types of cases the demands have registered similar outcomes - around 20% of non-resolved issues of compliance (on average). However, there are differences in the numbers of demands that the Court needs to issue (see table 3).

The results demonstrate that demands are applied three times more in cases with acquiescence (i.e. with diminished control) than those in which the Court monitors a case intensely. The late application of these demands is severe; the data shows that the Court, in instances in which the State acquiesced, issued demands more than four years on average from the issuance date of the Judgment on Reparations and Costs, instead of two years on average for States that have not acquiesced. By this tardiness, the Court does not pay attention to the beginning of the process and does not control initial States inaction. The Court loses, in consequence, its opportunity to issue effective demands since the data suggests that States are less interested in the progress of the case, maybe because public interest wanes as the years pass while the impunity sets firm roots.

Table 3 summed the number of demands on average and the time elapsed before the Court uses them in the Court cases.

**Table No. 4**

				Demand on average	Time before demand
<b>56 cases with acquiescence</b>	44 with authorities	4 without judicial obligation		2	28

		40 with judicial obligation	14 without authorities information	<b>10</b>	<b>45 months</b>
			26 with authorities identified	<b>14</b>	<b>48 months</b>
		6 without judicial obligation		4	19 months
	12 without authorities <sup>175</sup>	6 with judicial obligation		4	40months
<b>62 cases without acquiescence</b>	15 with authorities	3 without judicial obligation		4	26 months
		12 with judicial obligation		3	17 months
	47 without authorities	33 without judicial obligation		6	38 months
		14 with judicial obligation		3	19 months

## 2. States actions

The fact that States leverage diminished monitoring, however, is not enough to control damage mainly because the Court retains the issuance of its demands for compliance. States, in consequence, use two actions to block the prosecution of their AUTHORITIES. First, States take the (costless) step of complying, albeit slowly, with those obligations that do not involve AUTHORITIES (or non-judicial obligations), while still protecting AUTHORITIES by deflecting the pressure from the duty to comply with the judicial obligation. The other action is the interposition of means to exonerate the authority of guilt and obstacles of law for blocking the prosecution. The use of these actions is determined by how well the first strategies worked. For instance, from the success of other strategies (like remedial actions), the Court can issue a judgment without information regarding AUTHORITIES or eliminate pieces about their possible incrimination. In these cases, States must not need means to exonerate guilt or obstacles

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<sup>175</sup> Sawhoyamaya Indigenous Community v. Paraguay (Monitoring) ICHR, 8 February 2008, para. 54; Yakyé Axa Indigenous Community v. Paraguay (Monitoring) ICHR, 8 February 2008, para. 49, decides 1.

of law. When the Court did not consider actions of the previous Stages, this stage starts with non-judicial compliance.

The use of these actions is determined by how well the first strategies worked. For instance, from the success of other prior strategies (like remedial actions), the Court issues judgments without information regarding AUTHORITIES or eliminating pieces about their possible incrimination. In these cases, States could not need means to exonerate guilt or obstacles of law to protect AUTHORITIES. Accordingly, when the Court did not deliberate based on actions of previous Stages; this stage starts with non-judicial compliance.

***a) Compliance with non-judicial obligations***

The existence of political concerns such as providing protection to AUTHORITIES seems to determine the rate of compliance of non-judicial obligations, like financial reparations and symbolic measures.<sup>176</sup> States will report high compliance with non-judicial obligations to project a positive image that helps to clean up the tarnished reputation of AUTHORITIES while deflecting attention from complying with judicial duty. The dynamic of State institutions facilitates compliance with non-judicial obligations. In fact, States, more specifically, their executives, that are invoked to comply with non-judicial obligations, are concerned about reputation and perform this task since they are charged with foreign relations and the State's international standing. Thus, it is unsurprising that executives will be willing to compensate the victims for damages caused and reduce domestic contingency with symbolic gestures.

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<sup>176</sup> Both are individual obligations and they often show high compliance. This was the reason to consider them.

Indeed, the data seems to corroborate that when the AUTHORITY is identified in the Court judgment, States are inclined to comply with non-judicial obligations to offset the pressure to meet with another complex type of obligation such as judicial. States calculate then, the cost of such decision based on protecting AUTHORITIES. In fact, in those 26 cases in which their AUTHORITIES involved were identified the rate of compliance reaches 61% of compliance to non-judicial obligations and only the 12% of judicial obligations (see table 4). It also possible that States seek to restrict the reputational damage of the State or its authorities when deflecting the attention from the failure to comply with judicial obligation.

Concerning non-judicial obligations, there are 119 non-judicial (particularly, financial reparations and symbolic measures) and 51 judicial obligations distributed in the 40 of those 56 cases with acquiescence. Regarding those cases in which the ICHR judgment contains information of high officials, the rate of compliance with non-judicial obligations is 61%. This rate is better compared with the rate of cases in which the information about leading AUTHORITIES implicated is missing. In fact, in those cases in which there is no information in the judgment to incriminate AUTHORITIES, the rate reaches to 46% (see table 4). States are inclined to comply with both judicial and not-obligations when AUTHORITIES were not identified in narratives of the Court judgment. This tendency is also corroborated by the very similar rate of compliance of 46% and 55% for judicial and not- obligations of cases in which the Court did not identify the name of AUTHORITIES. Indeed, the data reveals a tendency by which once the Court omitted information of the senior officials in its narratives, the rate of



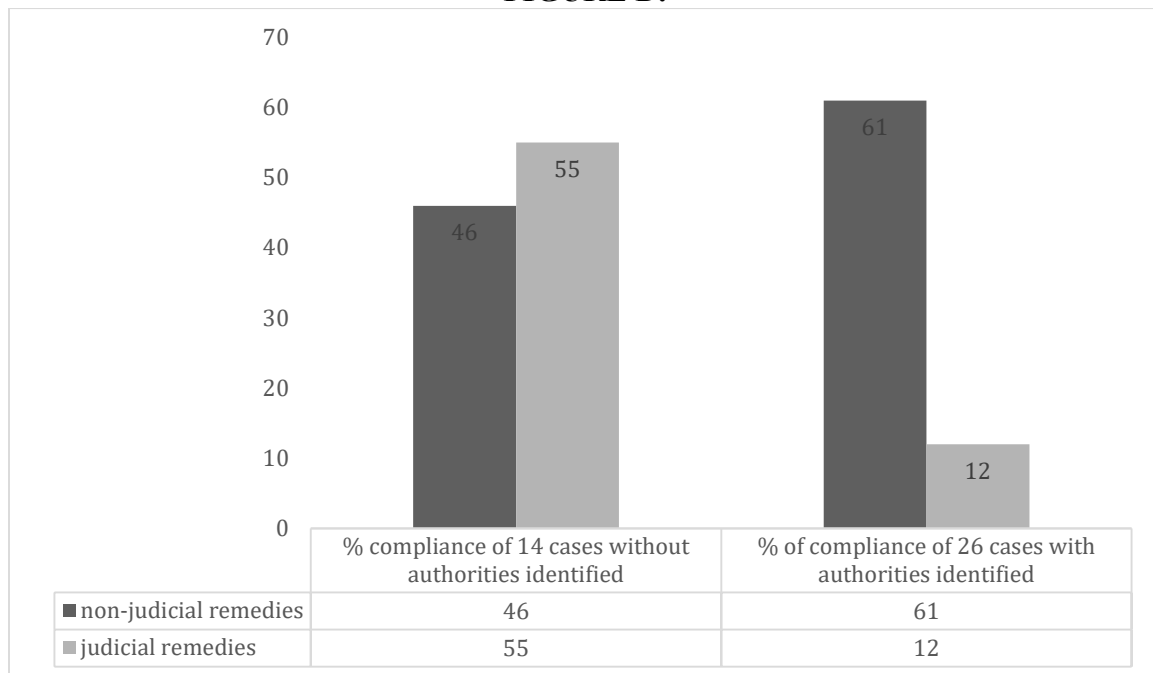
compliance decreases since States do not need exhibit a positive image to recover reputation for high AUTHORITIES.

In general, these results corroborate that States retain the same goal, namely, protect AUTHORITIES during the monitoring process. Table 4 presents the compliance with non- and judicial obligations restricted to 40 out of 56 cases with acquiescence. These 40 cases have judicial obligation only. These cases are separated between those without/with authorities as well without/with judicial obligation.

**Table No. 5**

			# Obligations with compliance	% Of compliance
<b>40 with judicial obligation of 56 cases with acquiescence</b>	14 without authorities information	Non-judicial remedies	22 of 47 obligations	46%
		Judicial remedies	5 of 19 obligations	55%
	26 with authorities identified	Non-judicial remedies	46 of 76 obligations	61%
		Judicial remedies	4 of 32 obligations	12%

**FIGURE D.**



**b)      *The use of exculpatory means***

The delay in starting the monitoring process facilitates the preparation of evidence of innocence and interposition of means to exonerate AUTHORITIES of guilt. Means to exonerate the guilt are a group of actions by which the domestic criminal processes have not typically developed until its completion. These actions are: acquittals, shelving the case, derisory punishments, pending resources, excessive delayed. Out of 56 cases with acquiescence, 15 allegations were submitted amidst 40 cases in where there are AUTHORITIES and judicial obligations. The remaining 16 cases do not contain these types of allegations, as they do not have AUTHORITIES. Regarding those 62 cases without acquiescence, States used 3 exonerates.

Elaborating on law obstacles, they are a justification for abuse and a deflection of responsibility. Prescription,<sup>177</sup> *non in bis in idem*<sup>178</sup> and amnesty laws<sup>179</sup> are law obstacles commonly used despite the Court reiterated to States that no mechanism for precluding responsibility that may be used to fail to comply or delay compliance with the judicial obligation.<sup>180</sup> Out of 56 cases with acquiescence, 22 law obstacles were used amidst 40 cases in where there are AUTHORITIES and judicial obligations. Regarding those 62 cases without acquiescence, States used 13 obstacles of law. These results

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<sup>177</sup> Trujillo Orozca v. Bolivia, supra 57 considering para. 4(e); Bueno Alves v. Argentina (Monitoring) ICHR, 5 July 2011, considering paras. 21-23 (prescription or statute of limitations is invoked to avoid criminally prosecuting those responsible for HR abuses, claiming that the deadline for doing so has past)

<sup>178</sup> La Cantuta, supra 7 para. 180; Ivcher Bronstein v. Peru (Monitoring) ICHR, 27 August 2010, considering para. 14; Carpio Nicolle, supra 7, para. 132. (The principle of non in bis in idem (double jeopardy or res judicata) is another commonly States argument for failing to uphold a judicial obligation)

<sup>179</sup> Vargas Areco v. Paraguay (Monitoring), ICHR, 30 October 2008, para 20; Almonacid Arellano, supra 98 para. 111, (domestic amnesty laws that attempt to bar the prosecution of certain crimes occurred during a specific period of a State's history is another common argument) (Crimes against humanity give rise to the violation of a series of undeniable rights that are recognized by the American Convention, which violation cannot remain unpunished)

<sup>180</sup> Vargas Areco, supra 7, para. 156; Manuel Cepeda Vargas, supra ,7 para. 156.

corroborate that when there is acquiescence, there are AUTHORITIES and States make major efforts to protect them that in cases without acquiescence (see table 5).

The data reveals that 46 cases of 56 cases with acquiescence have one of these two actions (means to exonerate or law obstacles). The conclusion is that both constitute a strategy to protect AUTHORITIES in cases with acquiescence. The data also serves to confirm that the strategy did work perfectly since only eight (out of 155) leading AUTHORITIES received condemnation. There are 55 condemnations (out of 1253) to those implicated in their condition of non-AUTHORITIES (like civilian or agents, paramilitaries, militaries and police forces). Regarding those 62 cases without authorities, there are five (out of 43) leading AUTHORITIES that received condemnation (see table 5). There are 20 condemnations (out of 143) to those implicated in their condition of non-AUTHORITIES. These results suggest that in the domestic dynamic of protection there are often judges and officials who provide protection for themselves or ensure a future protection for their own negligence, omissions or institutional responsibility.

The Court recognized that the three branches of Government manipulate legal and constitutional devices to impede (often) compliance with the judicial obligation by using law obstacles.<sup>181</sup> The fact is that it is the State itself (through branches of the States, military and police forces) who bars the justice to give protection to AUTHORITIES. This fact leads the Court to point out that compliance with the judicial obligation must be focused on the investigation, prosecution, arrest, trial, and conviction of those persons that are responsible for the facts and the violation of the rights protected by the American

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<sup>181</sup> La Cantuta, *supra* 7, para. 143.

Convention,<sup>182</sup> both as perpetrators and as instigators of the events.<sup>183</sup> The Court indicates that such investigations and proceedings need to be directed at the then highest-ranking government officers, from the President to high military and intelligence ranks, as well as current and former members of governments.<sup>184</sup>

The data shows that in those 56 cases with acquiescence and 62 cases without it – judiciary, police and military are who provide more protection rather the other branches. Regarding the participation of the executive, in 62 cases without acquiescence they have a reduced participation. The less participation of executives in cases without acquiescence is precisely explainable in that these cases have fewer AUTHORITIES to be protected.

Table 5 (below) details the use of exculpatory means and the AUTHORITIES and implicates in Court cases along with information about institutions that performed the protection.

**Table No. 6**

				Defense		Authorities and 3th implicated		Institution providing protection			
				Exonerates	Law obstacles	High-ranking authorities	Non-authorities	Police and military forces <sup>185</sup>	Judiciary	Executive office	Legislative
<b>56 cases with acquiescence</b>	44 with authorities	4 without judicial obligation		0	2	-	-	-	-	-	-
		40 with judicial obligation	14 without authorities information	3	3	21	799	1	20	10	1
			26 with authorities identified	12	14	131 <sup>186</sup>	433 <sup>187</sup>	31	16	16	1
	12 without	6 without		0	0	-	-	-	-	-	-

<sup>182</sup> Almonacid Arellano, supra 98, para. 111

<sup>183</sup> Id, para. 111

<sup>184</sup> La Cantuta, supra 7, para. 147

<sup>185</sup> Including prosecutors.

<sup>186</sup> Executive (21); Military (85); Judiciary (40) Prosecutor (4); Legislative (2)

<sup>187</sup> Civil (352); Military (265); Police (615)

	authorities <sup>188</sup>	judicial obligation									
		6 with judicial obligation		0	3	3*	21 <sup>189</sup>	3	-	-	-
SUBTOTAL				15	22	155	1253	35	46	26	2
62 cases without acquiescence	15 with authorities	3 without judicial obligation		1	0	-	-	-	-	-	-
		12 with judicial obligation		2	8	34 <sup>190</sup>	108 <sup>191</sup>	9	5	5	0
	47 without authorities	33 without judicial obligation		0	2	-	-	-	-	-	-
		14 with judicial obligation		0	3	9*	35 <sup>192</sup>	10	14	-	-
SUBTOTAL				3	13	43	143	19	19	5	0
TOTAL				18	35	198	1396	54	65	31	2

N: 198 high-ranking authorities.

\*They were not categorized under cases with AUTHORITIES since they seem with potential participation in the HR abuse as high-ranking and their participation was dismissed at the beginning of the proceedings (or was uncertain).

The presented results (see figure below) support the view that, the presence of AUTHORITIES in cases with acquiescence is markedly high and that fact coincides with a major use of exculpatory means and major level of institutional protection in comparison to cases without acquiescence and authorities.

<sup>188</sup> Sawhoyamaya Indigenous Community v. Paraguay (Monitoring) ICHR, 8 February 2008, para. 54; Yakye Axa Indigenous Community v. Paraguay (Monitoring) ICHR, 8 February 2008, para. 49, decidendi 1.

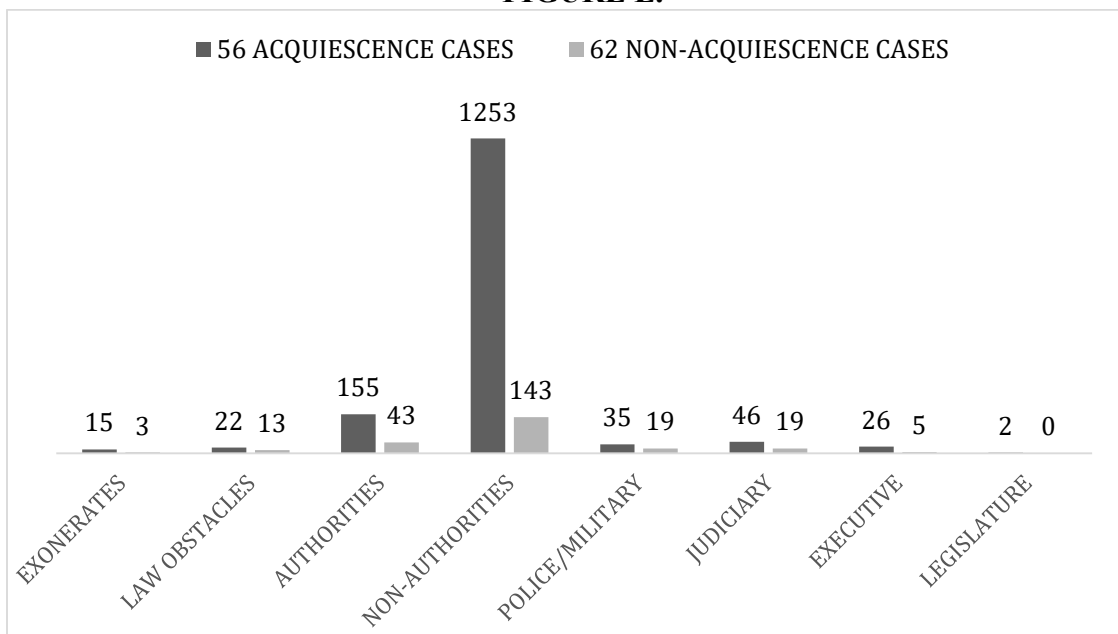
<sup>189</sup> These cases registered two convictions

<sup>190</sup> Executive (8); Military (22); Judiciary (3); Prosecutor (1)

<sup>191</sup> Civil (10); Military-Paramilitary (98)

<sup>192</sup> These cases registered 5 convictions

**FIGURE E.**



The presented data shows that, because of *a diminished monitoring, a late application of demands and the fact that prosecutions are prevented by domestic ways during the monitoring, the protection of AUTHORITIES prevails as a State goal that makes ineffective to move States away from noncompliance.*<sup>193</sup> Indeed, in the 26 cases (out of 56) acquiescence cases, where AUTHORITIES continue to be exposed to judicial prosecution, States use strategic compliance of non-judicial obligation and exculpatory means in 14 cases. There are yet 12 cases where AUTHORITIES were not protected from potential prosecutions. Meanwhile, the Court continues to defend its goal of prosecuting by sanctioning the insufficiency to comply with judicial obligations.

<sup>193</sup> Nevertheless, undeniable attempts at prosecution, though unsatisfactory, have been made in a handful of cases. *Castillo Paez v. Peru* (Monitoring), ICHR, 3 April 2009, considering para. 8; *Myrna Mack Chang v. Guatemala* (Monitoring), ICHR, 16 November 2009, considering para. 8; *Las Dos Erres Massacre v. Guatemala* (Monitoring), ICHR, 6 July 2011, para. 14

## **E. Stage 5. Sanctioning**

At this stage, the AUTHORITIES in the 12 remaining acquiescence cases are at risk since after the application of demands for compliance the Court continues to defend its goal of prosecuting by sanctioning the State insufficiency to comply with judicial obligations by two measures. The Court overreaches its quasi-judicial review function and reports the noncompliance case to another body to move States away from noncompliance. The Court enforces lately these cases in comparison with those cases without acquiescence.

Before starting with the Court strategy it is worth noting that, in general, there are not striking differences in the numbers of enforcement measures used in cases with and without acquiescence. However, they differ in their results because States that have acquiesced (in these 12 cases) do nothing toward compliance (see Table 7 below).

### **1. The Court enforcement strategy**

States have complied with non-judicial obligations, as was reported during Stage 4. However, States have ignored most of the demands for compliance that the Court has issued in the past Stage 4, especially regarding judicial obligations, registering few steps towards compliance. The Court performs, then, a strategy of sanctioning to force States to rearrange priorities and meet the Court expectations regarding compliance. The Court focuses on managing consequences by overreaching and reporting.

The measures of enforcement are virtually ineffective sanctions to take on severe obstacles to compliance. They are ineffective method since the Court resolves to apply a diminished follow-up process to the acquiescence and since these measures are used very late in the monitoring process. These measures also lack the necessary legitimacy since

they appear to be applied arbitrarily. The situation of these measures is further worsened due to lack of endorsement from the system's political bodies. In this way, they are toothless measures.

The use of these measures (at least initially) seems unnecessary for the Court. States were rewarded with the control over their actions (i.e., a diminished monitoring) considering their strong normative commitment, as Stage 4 demonstrated. A diminished monitoring entails that the Court resettles part of its control faculties on States. In this way, the Court appears to view the utilization of a procedure of "reporting" the case to another body if the State does not comply with the judgment, as something distant.

Although the Court refrains from using these measures in an original way, an interesting result is that the Court ended reporting seven instances with acquiescence to the GA of the OAS – regarding those 12 cases in which State strategies to protect their authorities had not been successful. Specifically, in all of them, States have used means to exonerate the guilty. However, States have not used law obstacles to block prosecutions yet. These law obstacles prevent AUTHORITIES from being subject to domestic sanctions in a permanent way. This practice of reporting to OAS is also used with cases without acquiescence (in 15 cases out of these 62 cases). Table 6 below compiles information of enforcement measures regarding all cases.

Reporting to OAS is, however, a very late measure. They are late since before reporting the case to the OAS, the Court applies measures of overreach that alters the obligation judicial to include new intrusive actions.<sup>194</sup> The Court used these kind of enforcements in more than one time in each case.

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<sup>194</sup> See details in methodology and illustrations in the next chapter



For instance, in *Molina-Theissen (Guatemala)* case, the Court issued on July 3, 2004 a judgment on reparations and costs ordered Guatemala to locate the mortal remains of Marco Molina-Theissen and to prosecute the responsible parties of its death. Five years later, the Court expanded these two obligations through a monitoring judgment: submit a schedule listing the steps to be taken, potential dates, institutions or persons in charge, the administrative and budgetary actions. In addition, the Court called for cooperation between various State institutions, ordering the State incorporate the case, as soon as possible, into the studies and actions carried out by two State institutions.<sup>195</sup>

States that have acquiesced seem disinclined to enforce these new measures since they risk their AUTHORITIES. Acquiescence States exhibit major noncompliance with the judicial obligation; thus, the Court uses these measures of overreaching considerably. The data that shows that 80% of these overreaching measures are applied to cases with acquiescence (16 out of 20 cases in which they were implemented) supports the previous suggestions. In the 62 cases without acquiescence, there are only four cases with overreaching (see table 6). States would also be disinclined since the Court affirms that during the monitoring it only can verify compliance and no facts.<sup>196</sup> The reason is that the Court can only determine States liability without punishing perpetrators<sup>197</sup> since individual criminal liability is reserved for domestic courts.<sup>198</sup>

For example, in *Carpio Nicolle (Guatemala)* case, the Court enlisted five extra duties destined to reinforce the original judicial obligation when the State needs to conduct investigation into an extrajudicial, arbitrary or summary execution must a)

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<sup>195</sup> *Molina Theissen*, supra 163, paras. 25-33, decidendi 2-3

<sup>196</sup> *Pueblo Bello Massacre v. Colombia (Monitoring)*, ICHR, 9 July 2009, para. 10

<sup>197</sup> *Constitutional Court v. Peru (Merits, Reparations and Costs)*, ICHR, 31 January 2001, Ser. C, No 71, para. 47; *Cantoral Benavides*, supra 11, para. 46.

<sup>198</sup> *La Cantuta*, supra 7, para. 156.

identify the victim; b) recover and preserve evidentiary material related to the death; c) identify possible witnesses and obtain statements from them concerning the death under investigation; d) determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death, and e) distinguish between natural death, accidental death, suicide and homicide. In addition, it is essential that a thorough investigation of the crime scene be conducted and rigorous autopsies and analyses of human remains be performed by competent professionals and using the most appropriate procedures.<sup>199</sup>

Given the prior application of overreaching actions, when the Court decides to report the OAS, these enforcement measures took 5 years on average from the issuance date of the Judgment of Reparations and Costs (see details in table below). The tardiness on the use of the measure of reporting makes it lose strength to run adequately. In fact, the Court members of the ICHR have warned that the method of reporting to the OAS can be ineffective. These members believe that "the Court, must make [the cases] known to the GA of the OAS,"<sup>200</sup> more frequently. They use their dissidence in the monitoring judgments to put pressure on the use of reporting by appealing to the rest of ICHR members and others at higher levels in the Inter-American HR System organization to report to the GA and political bodies the instances of noncompliance.<sup>201</sup> There are nine appellations; five came from acquiescence cases,<sup>202</sup> however, regardless of their good

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<sup>199</sup> Carpio Nicolle v. Guatemala (Monitoring) ICHR, 1 July 2009, para. 18

<sup>200</sup> Servellon Garcia, (Monitoring) ICHR, 27 November 2011, paras. 18 and 23 (Vio Grossi, J, sep. op)

<sup>201</sup> Case with acquiescence: Amparo, supra 150 (48 months); Caballero, supra 148 (48 months). Case without acquiescence: Aptiz, supra 150 (3 months); Hilaire, supra 150 (3 months).

<sup>202</sup> Vio Grossi Eduardo, J, sep. op. in the following cases: El Amparo (Monitoring) ICHR, 20 February 2012, para. 1 and 20 November 2015, para. 14; Blanco Romero, supra 143, para. 1 and (Monitoring), ICHR, 20 November 2015, para. 14 and considering 5; Caballero Delgado (Monitoring) ICHR, 27 February 2012, para.1; Juan Humberto Sánchez, supra 149, para.1; Saramaka People, supra 149,

faith, these petitions did not translate into measures of enforcement yet since ICHR members remain without consensus.<sup>203</sup>

The table 6 below exhibits the measures of enforcement applied to all 118 cases along with the average time in which were used by the Court.

## **2. State reactions: producing Noncompliance**

As it was mentioned above, the Court applies these measures of enforcement on a case-by-case basis. By doing so, the Court may single out specific targets. However, it risks being perceived or accused of arbitrarily singling out weak States to do it arbitrarily or “unfairly”<sup>204</sup> or be accused of that. Not all States view the Court as a legitimate, unbiased arbiter of justice. In fact, a mass of weak States believes the Court judgment attacks their autonomy to prosecute their AUTHORITIES. These States hold that the ICHR is usurping the functions as if were a colonial power.<sup>205</sup> States also assume that the Court represents the interests of powerful States, saying that its judgments are threatening States’ sovereignty and serving U.S. ‘imperialist’ interests.<sup>206</sup>

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para. 1 and (Monitoring) 23 November 2011, decidendi 2; Servellón García (Monitoring) ICHR, 22 November 2011, paras. 1 and 2.

<sup>203</sup> Compare Servellón García, (Monitoring) ICHR, 27 November 2011, para. 7 (García-Sayan, J, sep. op., against sending report) with paras. 18 and 23 (Vio Grossi, J, sep. op, favoring sending report)

<sup>204</sup> Oded Löwenheim, Examining the State: a Foucauldian perspective on international ‘governance indicators’, 29 THIRD WORLD QUARTERLY (2008) cited in Kelley & Simmons, AMERICAN JOURNAL OF POLITICAL SCIENCE, 57 (2015).

<sup>205</sup> Doug Cassel, Will Chavez remove Venezuela from the Inter-American Commission? *Opinio Juris* (blog), 11 may 2012, at <http://opiniojuris.org/2012/05/11/chavez-removes-venezuela-from-iachr> (this is the latest move in the Bolivarian Republic’s long record of denouncing the Commission and [the Court] as tools of US imperialism...) Corte IDH Blog: Tribunal Supremo Venezolano declara “Inejecutable” la sentencia de la Corte IDH dictada en caso Lopez Mendoza. Available at <http://corteidhblog.blogspot.com/>

<sup>206</sup> *Id.*

**Table No. 7**

				Overreaches 207	Appealing 208	Reporting 209	Months to enforce
56 cases with acquiescence	12 without authorities 210	6 without judicial obligation		0	0	0	-
		6 with judicial obligation		4	1	1	70
	44 with authorities	4 without judicial obligation		0	0	0	-
		40 with judicial obligation	14 without authorities information	4	1	3	105
			26 with authorities identified	8	4	3	95
62 cases without	47 without authorities	33 without judicial obligation		0	1	10	94

<sup>207</sup> Ibsen v. Peru (Monitoring), ICHR, 14 May 2013, considering (a) (b); Caballero v. Colombia (Monitoring), ICHR, 27 November 2002, considering 8; Blake v. Guatemala (Monitoring), ICHR, 27 November 2003, para. 7; Bamaca v. Guatemala (Court notes) 18 and 27 february 2015; Molina Thiessen v. Guatemala (Monitoring), ICHR 17 August 2009, considering 9; Carpio Nicolle v. Guatemala (Monitoring), ICHR, 01 July 2009, paras. 18 and 22; Tiu Tojin, *supra*. 143, paras. 10, 16 and 17; The Street Children Institute v. Paraguay (Monitoring) ICHR, 19 November 2009, para. 37; Campo Algodonero v. Mexico (Monitoring), ICHR 21 May 2013, considering 2; Velez Looor v. Honduras (Monitoring), ICHR 13 February 2103, para. 17; Vargas Areco v. Paraguay (Monitoring), ICHR, 30 October 2008, para. 16; Cantoral Benavidez v. Peru (Monitoring), ICHR 17 November 2004, considering 17 and 18; Durand v. Peru (Monitoring), ICHR 27 November 2002, para. 4; Moiwana v. Suriname (Monitoring), ICHR, 21 November 2007, considering 13 and para. 6(d); Montero Aranguren (Monitoring) ICHR, 17 November 2009, paras. 22, 28, 74; Amparo v. Venezuela, *supra* 44; Blanco Romero, *supra* 143.

<sup>208</sup> *Supra* 159, Bueno Alvez v. Argentina (Monitoring), ICHR 5 July 2004, para. 47; The Street Children Institute v. Paraguay (Monitoring), ICHR, 27 January 2009, para. 37-8.

<sup>209</sup> Benavidez Cevallos v. Ecuador (Monitoring), ICHR, 27 November 2003, para. 12; Ivon Neptune v. Haiti (Monitoring), ICHR, 20 November 2015, para. 9; Yatama v. Nicaragua (Monitoring), ICHR, 20 November 2015, para. 12 and decision 5; Loayza Tamayo, Castillo Paez and Castillo Petruzzi by information recorded in the Report of Antonio A. Cancado Trindade in the Annual Report at 8, dated Abril 13, 2000; Saramanka v. Suriname (Monitoring), ICHR, 23 November 2011, at, 1 para. 1 (Vio Grossi Eduardo. J, sep op.); Caesar v. Trinidad & Tobago (Monitoring), ICHR, 27 November 2015, resolving 5; Hilaire v. Trinidad & Tobago (Monitoring), ICHR, 27 November 2015, resolving 5; Montero Aranguren v. Venezuela (Monitoring), ICHR, 20 November 2015, para. 14 and considering 5; Caracazo v. Venezuela (Monitoring), ICHR, 20 November 2015, para. 14 and considering 5; Amparo v. Venezuela (Monitoring), ICHR, 20 November 2015, para. 14 and considering 5; Blanco Romero v. Venezuela (Monitoring), ICHR, 20 November 2015, para. 14 and considering 5; Barreto Leiva v. Venezuela (Monitoring), ICHR, 20 November 2015, para. 14 and considering 5; Aptiz v. Venezuela (Monitoring), ICHR, 20 November 2015, resolving 5; Reveron v. Venezuela (Monitoring), ICHR, 20 November 2015, para. 14 and considering 5; Uson Ramirez v. Venezuela (Monitoring), ICHR, 20 November 2015, para. 14 and considering 5; Rios v. Venezuela (Monitoring), ICHR, 20 November 2015, para. 14 and considering 5; Perozo v. Venezuela (Monitoring), ICHR, 20 November 2015, para. 14 and considering 5.

<sup>210</sup> Sawhoyamaya Indigenous Community, *supra* 9, para. 54 and Yakye Axa Indigenous Community, *supra* 122, para. 49, decides 1.

acquiescence		14 with judicial obligation	3	1	5	36
	15 with authorities	3 without judicial obligation	0	0	0	-
		12 with judicial obligation	1	1	0	50
			20	9	22	

For instance, Peru and Venezuela accused the Court of violating the principle of non-intervention by alluding to judgments by its domestic Courts. These statements against the Court serve as the basis for noncompliance and also made the enforcement actions ineffective since they produce self-marginalization of the States of the Inter-American HR System by denouncing the Convention under the article 78.<sup>211</sup> The Court's ability to monitor its case population as of 2010 was affected in almost 35% by the action of denouncements.<sup>212</sup> There are additional instances in which the State threatened to withdraw its acquiescence of the contentious jurisdiction of the Court.<sup>213</sup>

Thus, the way in which States react to enforcement measures can also weaken the Court's legitimacy and additionally undermines the influence of these measures. Since the data shows that States react moving away from compliance after the Court applied these measures of enforcement rather than toward compliance. The data demonstrate that

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<sup>211</sup> Article 78 of the Convention provides the States Parties the right to denounce the Convention. By denouncing the State is not immediately freeing itself of its international HR obligations. The effective date of the denunciation is then one year from the date of the notice of denunciation. This is consistent with accepted international principles and article 56 of the Vienna Convention. Further, States remain subject to the authority of the Court for started and monitored cases. Ivcher Bronstein v. Peru (Competence) ICHR, 24 September 1999, Ser. C No. 54, paras. 40 and 46.

<sup>212</sup> Three States denounced the Convention: Trinidad, with 2 cases; Peru, with 25 cases; and Venezuela, with 10 cases.

<sup>213</sup> Honduras threatened to withdraw its acceptance of the jurisdiction of the Court by the intent of the Court to force Honduras to comply with judgments of Velasquez Rodriguez and Godinez Cruz cases by reporting to the GA. Honduras lobbied to block that situation (See JO M PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 288-9 (Cambridge University Press. 2003). Ecuador also (by lobbying) prevents the discussion by the GA of its noncompliance that was reported by the Court (Annual Report 2003 – Chapter III <[www.cidh.org/annualrep/2003eng/chap.3k.htm](http://www.cidh.org/annualrep/2003eng/chap.3k.htm)>) On November 4, 2014, the Constitutional Court of the Dominican Republic claims that the instrument for accepting the competence of the ICHR unconstitutional, which could serve as a basis for denouncement in the future and supports the trend to be exhibited here.

in 67.8% of those 56 cases with acquiescence among which these rules of enforcement were used, States engaged in actions and inactions that entail a move away from compliance. This percentage is inferior on those 62 cases without acquiescence (48% away). In other words, measures of enforcement have a better expectation of moving States to compliance in cases without acquiescence (see Table 7).

Indeed, there are some reasons that the data suggests why States disobey the Court enforcement. States could be ignoring the enforcement because they have submitted (during the monitoring) diverse evidence to exonerate the guilt or law obstacles for their AUTHORITIES in 14 cases. Thus, their AUTHORITIES (at least, in accumulative 44 cases) are not under relevant risk. Moreover, those cases in which AUTHORITIES are involved - have lost all renowned or public attention given that several years passed before the enforcement is applied (see last column of Table 7).

Table 8 shows State reactions to measures of enforcement to compare the different reactions that States that have acquiesced have in relation with those that have not.

**Table No. 8**

				Steps toward compliance <sup>214</sup>	Steps away from compliance <sup>215</sup>	Unresolved issued of compliance <sup>216</sup>
56 with acquiescence	12 without authorities			2	7	3
	44 with authorities	4 without judicial obligation		0	1	3
		40 with judicial obligation	14 without authorities information	2	10	2
			26 with authorities	1	<b>20</b>	4

<sup>214</sup> Steps toward compliance entail actions such as persecution authorities or non-authorities.

<sup>215</sup> Steps away from compliance entail actions like keep law obstacles or established new obstacles/exonerates and non-reporting.

<sup>216</sup> Unresolved issues of compliance entails actions: moving process, ending law obstacles, remaining unresolved and removing exonerates.

			identified			
			SUBTOTAL	5	38	12
		33 without judicial obligation		17	12	4
	47 without authorities	14 with judicial obligation		0	10	4
		3 without judicial obligation		1	1	1
62 without acquiescence	15 with authorities	12 with judicial obligation		2	7	3
			SUBTOTAL	20	30	12
				26	68	24

The State reaction to these measures also relates to the lack of endorsement from the system's political bodies. Neither the Commission, a watchdog intended to be the Court's equal, nor the OAS GA, have endorsed the authority to the Court, further weakening the Court's ability to command enforcement of its judgments.<sup>217</sup> This lack of endorsement is evident in the fact that the OAS GA has never discussed the reported noncompliance.<sup>218</sup> Few cases reach this height of importance for other countries to consider the HR situation. There is no interest among States to apply material consequences for noncompliance,<sup>219</sup> or at least, to comment on another State's Court cases.<sup>220</sup> Even worse, regional publicity of cases rarely translates into interstate pressure to comply.<sup>221</sup> As we can see, not all States view the Court as a legitimate, unbiased

<sup>217</sup> Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights* 7, 28. 2013.

<sup>218</sup> *Supra*, Chapter 1, footnote 73

<sup>219</sup> Wright-Smith, *The decision to comply: Patterns of compliance with the Inter-American Court of Human Rights* 251. 2011. (Rather than condemn another country's HR practices, States reserve their criticism for attempted coups or interstate conflicts.)

<sup>220</sup> KECK & SIKKINK, *Activists beyond borders: Advocacy networks in international politics* 113. 1998.

<sup>221</sup> It is no doubt that the publicity is a potential factor to enhance State's willingness to acquiesce. For instance, in 2004, former President of Guatemala, Oscar Berger, acquiesce in three cases: Plan de Sánchez (Merit) 29 April 2004, para. 38, Molina-Theissen (Merit) 04 May 2004, para. 36, and Carpio-Nicollé (Merits, Reparations and Costs) 22 November 2004, para. 39. The President also publically apologized to all HR victims. The most practical reason for these declarations may be the government desired to improve its tarnished international image and projects a positive public image to attract foreign capital. However, a State can reject full responsibility when there is not indisputably linked to

arbiter of justice. Only in the case that all States would see the Court as a legitimate, impartial arbiter of justice, its interactions would be stronger and have more influence over the “States material power” such that judgment compliance would contribute to a State’s reputational strength while noncompliance would weaken its reputational strength.

Cases with acquiescence differ at this stage as to how well the strategies in previous stages worked. Thus, as these cases were separated to track the strategy and its effects on compliance (see Table 8), the data shows the following. There are 56 cases with acquiescence that have an overall rate of 21%. This overall rate is disaggregated in 40% of compliance when the strategies used to protect authorities are entirely successful, 10% when the strategies are partially satisfied and 1% of compliance when the strategies are entirely unsuccessful.

40% regarding 30 cases where the State strategies from stages 1 to 3 have reached the objective to protect the AUTHORITIES from prosecutions. Thus, when State strategies are successful, the rate of compliance of cases with acquiescence is similar to the rate of compliance of those 62 cases without acquiescence (50%). However, the rate of cases with acquiescence decreases to 10% in 14 cases where the strategies of stage 1-3 were unsuccessful, even when exculpatory means were used on stage 4. At this stage, the data also made consistent that cases with acquiescence were controlled in a much-diminished way by the Court in comparison with those 62 intensely monitored. At the

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government agents (as explained in Stage 1). Thus, States would be less willing to acquiesce. This is the context in which Guatemala rejects responsibility in Carpio Nicolle alluding that the crime was not political (Merits, Reparations and Costs) 22 November 2004, para. 38 (7)) and in Bámaca-Velásquez alluding fear to affect the domestic reconciliation (SUSAN BURGERMAN, MORAL VICTORIES: HOW ACTIVISTS PROVOKE MULTILATERAL ACTION 109 (Cornell University Press. 2001).) Both cases were public because involving the assassination of a presidential candidate and an international public campaign for an investigation into the disappearance of a former guerrilla leader with the U.S. support.



stage 5, the rate of compliance is even worse, 1% of compliance in the 12 remaining cases where the strategies of stage 1-4 were unsuccessful and then noncompliance is the last resort that State used to protect AUTHORITIES.

**Table No. 9**

Number of cases	Type of control	Strategies of 1-3 stages	Strategies of 4-5 stages	Compliance rate
56 acquiescence	Diminished control	30 cases with successful strategies	-	40%
		26 cases with unsuccessful strategies	14 cases with successful use of exculpatory means	10%
			12 without exculpatory	1%
62 non-acquiescence	Intense control			50%

In effect, many of the relevant compliance data are not consistent with expressions used to acquiesce. States have not complied with the prosecutions that related with the accepted justice violations. None of these obligations, in which States have promised to comply with Court orders, have ended in compliance. A picture that emerges from State's failure to report or report only initial steps toward an investigation of the violation and prosecution of alleged HR violators, but, without full progress to investigating or prosecuting all the perpetrators. Victims, in effect, remarked that acquiescence has no real content and constitutes only a legal formula that not only attempts to hide the gravity of the State crime committed and is a mechanism to present itself as respectful of the international HR obligations and assumed commitments.<sup>222</sup> These results support the view that, neither acquiescence nor associated behaviors involve a meaningful commitment by the State to prosecute authorities, questioning the

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<sup>222</sup> Valle-Jaramillo et al. v. Colombia (Merits, Reparations, and Costs) ICHR, 27 November 2008, Ser. C No. 192, para. 27.

authenticity of States' acquiescence, legal commitments and promises and scuppering one of the most pressing and elusive goals of the Court: the prosecution of HR violators.

### ***Conclusion***

The purpose of this Chapter was to present the results and analysis of patterns of interaction uncovered in 118 politically complex cases involving many petitioners, complicated policies, and various government institutions. At a general level, it was made by asking how do States move toward or away from compliance in their interaction with the Court and its judgments, the analyzed data are steps toward an understanding of the role of interaction in international politics and on the dynamics of compliance with international judgments.

In effect, the analyzed data offers strong support for my argument that the interaction between States and the Court provides the missing key to explaining the complex and unexpected relationship between acquiescence, compliance, and other factors. In this way, compliance is not an all-or-nothing case; rather, it results from a story that unpacks contributions from States and Courts. If my conclusions are correct, the interaction affects the amount of compliance that States will be willing to supply; then I have demonstrated and described the judgment compliance as a process constituted by five successive stages and the interaction between States and the Court is the causal mechanism for the judgment compliance.

Both the process and mechanism causal arise to light from a surprising outcome: acquiescence leads to lower compliance rates when there are high-ranking authorities implicated in a Court case. I proposed that this surprising finding is understandable by analyzing acquiescence as the antechamber ("tip of the iceberg") of a series of actions

that constitute a predetermined process to minimize consequences for AUTHORITIES of being damaged by an international judgment. The interaction between States and the Court is, thus, partially the result of incompatible State and Court goals for the resolution of the case. The Court decides by law and morality principles, rejecting some of these series of instrumental State actions by issuing judgments that command to States to proceed against their AUTHORITIES. States fail to comply or enter long enforcement monitoring processes given their goals of protecting AUTHORITIES. Compliance and noncompliance are in consequence understandable from a combination of normative concerns and instrumental calculations coupled with practical realities/considerations that come from (or depend on) the interaction.

These strategic actions employed by the States during the Court proceedings and monitoring have led to a negative variation in compliance. I suggest (as my evidence reveals) that the reason for this result is that when State strategies to protect their AUTHORITIES do not work, and the Court issues an order to prosecute that threatens the protection of AUTHORITIES, the extensive noncompliance emerges understandable like the last resort that States have to use to protect AUTHORITIES. The data also reveals that from these State strategies compliance and noncompliance are achievable differently. The analysis is, in fact, compatible with the observation that the interaction between States and Courts affect compliance in predictable ways, and it would predict that compliance is strongest where States propose anticipatory remedial actions and these remedies link between cooperation and procedural progress – even if State interests point in the opposite direction. Also, compliance is higher with non-judicial obligations and when authorities are protected from prosecutions.

The stages identified in the emergence of judgment compliance are not explanations but rather observations in their context, in other words, they form the structure of the relationship; actions/interactions and their outcomes and the Court and States' usual or strategic responses. They are signaling, exchange, negotiation, monitoring and sanctioning.

The first three stages happened during the judicial proceedings (adjudicative process). In the first phase, the groundwork for judgment compliance is laid by building legitimacy to act during the court proceedings. In this stage, States start to restrict the facts of state repression to keep abuses secret by acquiescing. The visibility and potential discussion of the facts that involve AUTHORITIES comprise the second stage of building a consensual restriction of the events between States and the Court. The process may continue with the construction of compliance by expressing sovereignty and power, which is the third stage. There is systematic evidence to suggest that States that have acquiesced often make commitments and engage in behaviors (as shown stage 1 to 3: such as promising, requesting, proclamation limited responsibility and sovereignty and remedying by complying with non-judicial obligations) that anticipate that they will comply with the ordered obligations. Notwithstanding, it was demonstrated that these actions were used to protect AUTHORITIES. Recall that at the end of phase 3; state strategies met success in 30 cases out of 56 acquiescence cases, and AUTHORITIES remain identified in only 26.

The beginning of the stage fourth entails unsuccessful prior State strategies since the presented analysis is consistent with the observation that the Court shapes its interaction with States during the monitoring by the issuance of HR judgments that can

potentially affect international law and politics by shaping the State's sovereign power. It does so by providing legal resources that translate into the power to name violations and violators in particular intrusive law remedies. Put plainly, the issuance of an obligation destined to domestic prosecute AUTHORITIES responsible for the HR violations.

However, my results corroborate that States know from the beginning that they can leverage - the Court rewards expressed in a diminished monitoring and enforcement – in the use of political factors often limit the Courts and its nuanced, complex interaction with the State in this fourth phase. The mentioned is visible in 14 of these 26 cases in which States rescue AUTHORITIES of further responsibility at domestic level by blocking prosecution. Thus, these political factors are practices of jealous States of their sovereign that ignore the HR abuses committed by AUTHORITIES. The entrenched impunity institutionalized on State structures counteracts the Court's desire to change substantively on State levels. In where (also) domestic institutions allow the stabilization and distribution of noncompliance idea throughout the government. The Court responds by the implementation of soft measures to counteract adverse effects of these actions; however, noncompliance with judicial obligations that orders domestic prosecutions persists.

In stage 5, States would be worried then for actions of the Court regarding the 12 remaining cases. AUTHORITIES of these cases are at risk since, after the application of demands for compliance at stage 4, the Court performs a strategy of overreaching the original obligations and reporting to a political body to move States away from noncompliance. However, neither of two extreme measures translates into full compliance with the judicial obligations. On the contrary, after application of these Court

measures – States instead of act consistently with the Court interests and take steps toward compliance, react in opposite direction by doing nothing toward compliance and stopping to report with the Court. Moreover, the inaction of intergovernmental institutions weakened the Court's strategic ability to command enforcement of its judgments.

Although the analyzed data focus on the emergence of judgment compliance and noncompliance, these cases are aimed at investigating the far-reaching impact and operation of the interaction on international action, and could apply to other topical domains. For example, no evidence in the data contradicting that the Court can leverage the nature of the relationship and aspects of its frequent interaction with States to remove (to some extent, at least) the current unprogressive HR situation. However, it brings to the conclusion that to change an unprogressive HR situation it is both appropriate and necessary for Courts be convinced that States can change their behavior in light of the nature of the relationship and aspects of their frequent interaction. To do so, the Court needs to crystallize its goals toward interconnections that relegate the idealism by a discourse that needs to be also progressist, pragmatic and even strategic. Therefore, there is a need to implement behavioral changes they will be addressed in Chapter 5.

***Summary.*** Chapter 2 was an overview of my methodology. This Chapter reported data for revealing patterns of the interaction between States and the Court. In decisions about acquiescence and judgment compliance, the qualitative data analysis conveys ways in which these patterns are expressed – Chapter 4 includes illustrations to do this task.

# **CHAPTER FOUR:**

## **ILLUSTRATING A STRATEGY TO PROTECT**

### **AUTHORITIES**

#### **I. INTRODUCTION**

The qualitative analysis reported in Chapter 3 deserves to be illustrated. So far, this dissertation distinguishes five different Stages in which the relationship between (non) acquiescence and (non) compliance is associated with a strategy to protect AUTHORITIES. Recall that the five Stages are: signaling, exchange, negotiation, Monitoring, and sanctioning. This Chapter sets out a narrative for each phase. This narrative gradually reveals a framework of patterns in – the interaction between the States and the Court during the judicial proceedings and the monitoring process. The rest of this Chapter consists of two sections. Part II offers illustrative cases that support the qualitative analysis. It first points to the appearance of acquiescence in which key patterns from Stages 1 to 3 are illustrated and then proceeds to illustrate the shape of compliance in which key patterns from Stage 4 and 5 are exhibited. Then, the Chapter turns in Part III to deviations from the fundamental patterns presented.

## II. ILLUSTRATING THE STRATEGY

Blake v. Guatemala is a useful case in which the State's interaction with the Court serves as a prototypical illustration of the use of the strategy presented,<sup>1</sup> with other cases serving as supplementary examples.

### A. The appearance of acquiescence

The relationship between the Guatemala government and the Court allows Guatemala to expect that the Court reactions will be positive to its acquiescence. Guatemala acquires such knowledge by the number of acquiescences presented. In fact, nine of those 56 cases of acquiescence that is under the System (18%) originate from Guatemala.<sup>2</sup> Guatemala can use this knowledge to accommodate its interests to the extent that it predicts the reactions of the Court. An interest of the State is protecting its AUTHORITIES and it grants them cover. The protection of AUTHORITIES is one of the factors that contribute to the phenomenon theorized, as was shown in Figure 1 of Chapter 3, Section I. This section initially displays the implication of AUTHORITIES in the

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<sup>1</sup> Blake v. Guatemala (Objections) ICHR, 2 July 1996, Ser. C No. 27; Blake v. Guatemala (Merits) ICHR, 24 January 1998, Ser. C No. 36; Blake v. Guatemala (Reparations and Costs) ICHR, 22 January 1999, Ser. C No. 48; Blake v. Guatemala (Interpretation of the Judgment of Reparations and Costs) ICHR, 1 October 1999, Ser. C No. 57; Blake v. Guatemala (Monitoring) ICHR, 27 November 2002; Blake v. Guatemala (Monitoring) ICHR, 27 November 2003; Blake v. Guatemala (Monitoring) ICHR, 27 November 2007; Blake v. Guatemala (Monitoring) ICHR, 22 January 2009 ; 11 cases v. Guatemala (Monitoring) ICHR, 21 August 2014; 12 Guatemalan's Cases v. Guatemala (Monitoring) ICHR, 24 November 2015.

<sup>2</sup> Blake, id; Bámaca Velásquez v. Guatemala (Reparations and Costs) ICHR, 22 February 2002, Ser. C No. 91; Myrna Mack Chang v. Guatemala (Merits, Reparations and Costs) ICHR 25 November 2003, Ser. C No. 101; The Plan Sanchez Massacre v. Guatemala (Merits) ICHR, 29 April 2004, Ser. C No. 105; Molina-Theissen v. Guatemala (Merits) ICHR, 4 May 2004, Ser. C No. 106; Carpio Nicolle v. Guatemala (Merits, Reparations and Costs) ICHR, 22 November 2004, Ser. C No. 117; Maritza Urrutia v. Guatemala (Merits, Reparations and Costs) ICHR, 27 November 2003, Ser. C No. 103; Tiu Tojín v. Guatemala (Merits, Reparations and Costs) ICHR, 26 November 2008, Ser. C No. 190; "Las Dos Erres" Massacre v. Guatemala (Preliminary Objection, Merits, Reparations and Costs) ICHR, 24 November 2009, Ser. C No. 211; Chitay Nech v. Guatemala (Preliminary Objections, Merits, Reparations and Costs) ICHR, 25 May 2010, Ser. C No. 212.



Blake case and a tactic of cover-up developed by the State. After that, key patterns from 1st to 3rd Stages are presented.

**1. AUTHORITIES and cover-up**

**a) States acquiesce when there are AUTHORITIES involved. This pattern was incarnated in 44 of the 56 cases with acquiescence.**

The Blake (Guatemala) case illustrates the implication of AUTHORITIES in a process before the ICHR with acquiescence. These AUTHORITIES were implicated by their participation in decisions and acts that constitute HR violation.

The Court in its Judgment on Merits stated that according to statements not refuted by the State during the proceedings: A Commander of the El Llano Civil Self-Defense Patrol (Mr. Mario Cano) ordered the members of the El Llano Civil Patrol to detain and execute Mr. Nicholas Blake, a 27-year-old American independent journalist, on March 28, 1985. The detention results from his participation in a guerrilla investigation that compromised State interests. Subsequently, an Army Commandant and Chief of the Civil Patrols (Mr. Felipe Alva) ordered the body of Mr. Nicholas Blake to be burned and buried.<sup>3</sup>

Nonetheless, at the beginning of the Blake proceedings, the State emphasizes that only there is a “direct and individual” responsibility of the PACs for the death of the American journalist Blake.<sup>4</sup> Since 1982, Guatemala instituted a Civil Patrol System, called PACs, that employs civilians to patrol and attack other civilians.<sup>5</sup> This system

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<sup>3</sup> Id., para. 52(a) (e); Id. 31, 52 (a), 52(e); Blake, supra 1 para. 12

<sup>4</sup> Id., para. 25.

<sup>5</sup> PATRICK DONNELL BALL, et al., STATE VIOLENCE IN GUATEMALA, 1960-1996: A QUANTITATIVE REFLECTION 19 (Advancement of Science. 1999).

seeks to stop the guerrilla extension in Guatemala by pro-government citizen militias.<sup>6</sup> Guatemala claimed that members of the Civilian Defense Patrol (PACs) were not technically State agents. The evidence of the case, however, determined government ties to PACs “[...] Civil Defense Patrols (PACs) had an institutional relationship with the Army, were assisted and coordinated by the Ministry of National Defense, received direct orders from the Army regarding their actions, and operated under its supervision.”<sup>7</sup> The Court stressed that the PACs received direct orders from the State army but also funding, weapons, training.<sup>8</sup>

These militias created for self-defense against the guerrillas promptly moved to be used as an offensive force working<sup>9</sup> in collaboration with army personnel in committing killings and disappearances of people in communities who were not under army control.<sup>10</sup> The State seems to deny responsibility to avoid the creation of precedents for future proceedings. Especially since those events of the Blake case were committed during the internal armed conflict and carried out by military agents and members of the PACs in a context of paramilitary violence ordered, supported and promoted by the State. Consequently, any precedents would lead to judicial persecutions against military and political AUTHORITIES implicated either connected with the PACs or authorities of the PACs. The Blake case illustrates that Mr. Felipe Alva, a high-ranking authority responsible for State-sponsored violation against Mr. Nicholas Blake, possessed an influential position as a member of the military party (PACs) that helped him to remain

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<sup>6</sup> Id.

<sup>7</sup> Blake, *supra* 1, para.52 (p)

<sup>8</sup> Id., para. 52 (p).

<sup>9</sup> Id.

<sup>10</sup> Id.

free of any responsibility.<sup>11</sup> After, he continued to hold an influential political position in the Guatemala government to maintain his impunity (including the 2014 monitoring).<sup>12</sup> The Blake case can be supplemented with various cases, however, it is worth mention a case that brought to light how hundreds of AUTHORITIES were involved in an “alliance of security forces and intelligence services” to commit transborder HR violations - see further details about the Goiburu (Paraguay) case.<sup>13</sup>

**b) The presence of AUTHORITIES often leads to a tactic of cover-up.**

By the merits of the Blake case, it was established that only after seven-years of systematic State cover-up of the crimes related to Mr. Blake illegal detention, forced disappearance, and death, his fate was revealed on June 14, 1992.<sup>14</sup>

Statements of the Blake proceedings make clear that the Guatemalan government, including its top AUTHORITIES in office, does indeed not want to expose those responsible to the public scorn of criminal prosecutions. For instance, the former Guatemalan President Ramiro de Leon-Carpio at the U.S. Embassy corroborated the cover-up. He asserts, “it was true that the Civil Patrol had killed [Mr. Nicholas Chapman] that the Army had known this all along and had covered it up [...]”<sup>15</sup> Likewise, Colonel Francisco Ortega, Chief of Military Intelligence corroborated the cover-up performed by Guatemalan Military Intelligence “[he was] agreed that no progress had been made in the Blake case and that Guatemalan Military Intelligence had known almost immediately what had happened to [Mr. Nicholas Chapman], [however] had never sent investigators

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<sup>11</sup> Blake, *supra* 1, para. 52 (e) (h) (j)

<sup>12</sup> *Id.*, considering 2

<sup>13</sup> Goiburú v. Paraguay (Merits, Reparations and Costs) ICHR, 22 September 2006, Ser. C No. 153, paras. 84 and 89.

<sup>14</sup> Blake, *supra* 1, para. 1 and 52 (o)

<sup>15</sup> *Id.*, para. 31c)

to the area to arrest the suspects.”<sup>16</sup> The failure of General Gramajo, Minister of Defense, and General Mata-Gálvez to release incriminating information of alleged perpetrators was evident in the proceedings when they informed to U.S. ambassador that, “they had no information about the Blake investigation or its results, although [...] they had been specifically told who the suspects were.”<sup>17</sup>

Guatemalan AUTHORITIES seem to act in complicity with those responsible or their networks of protection under the belief that the cover-up is justified by firmly entrenched practices that aim to protect the State reputation from scandal. Despite this, the Court ended up by ordering a judicial obligation in the Judgment on Merits dated on January 24, 1998, by which “the Guatemalan State shall investigate the facts leading to the disappearance and death of Nicholas Blake, identify and punish those responsible.”<sup>18</sup> This pattern is not restricted to Guatemalan cases; it applied, for instance, to Colombian authorities that also act in complicity with active networks of protection to cover-up HR abuses. In these violations, the perpetrators are commonly paramilitaries groups.<sup>19</sup>

## **2. Key patterns of Stages 1 to 3**

Illustrating the patterns by which States and the Court proceed to this point requires breaking each Stage into its component parts.

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<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id., considering 35

<sup>19</sup> Rochela Massacre v. Colombia (Merits, Reparations and Costs) ICHR, 11 May 2007, Ser. C No. 163, para. 90-1

**a) Stage 1. Signaling and its key patterns — acquiescence, commitments, promises of States and the praises of the Court**

(1) States which acquiesce (early) when doing nothing is costlier since there is proof against AUTHORITIES and preliminary objections have been used or failed. This pattern was visible in 30 cases.

In the Blake case, the above revised declarations of leading AUTHORITIES have confirmed the presence of implicated AUTHORITIES.<sup>20</sup> The presence of AUTHORITIES made costly ‘doing nothing’ at the beginning of the ICHR proceedings, as discussed in the prior Chapter . Moreover, there is proof against foremost AUTHORITIES. However, this evidence becomes disputable since, throughout 1985-92, members of the Civil Patrols purposely presented contradicting information, further obstructing the investigation.<sup>21</sup> Likewise, the State conceals the whereabouts of Mr. Blake’s body and makes the investigation difficult.<sup>22</sup> In the process before the ICHR, the presence of AUTHORITIES leads the State to object initially the admissibility of the application and the Court jurisdiction.

The State interposes three preliminary objections to avoid the criminal analysis of the case,<sup>23</sup> claiming that the Court is not competent to hear the case based on the time,<sup>24</sup> on the subject matter,<sup>25</sup> and finally, because of there was an invalid interpretation of the Convention.<sup>26</sup> On July 2, 1996, the Court issues its Judgment on Preliminary

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<sup>20</sup> Blake, *supra* 1, para. 31 (c) (d)

<sup>21</sup> *Id.*, 52 (o).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, para. 23

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, paras. 25 and 41

<sup>26</sup> *Id.*, para. 27

Objections.<sup>27</sup> The Court rules that there is some merit in the first objection, and dismisses the second and third objections on inadmissibility grounds.<sup>28</sup> The Court kept its jurisdiction to analyze the forced disappearance as a continuing violation that began before the acceptance of its jurisdiction but continued after the acceptance, the Court limited its analysis to the effects of the crime.<sup>29</sup>

Only after the Court partially rejected objections submitted by Guatemala,<sup>30</sup> it became evident that the Court would hear witnesses.<sup>31</sup> Guatemala withdrew its initial deflections of liability and accepted partial responsibility,<sup>32</sup> as strategy to bring protection to its AUTHORITIES. Although the State denies its intervention in the extrajudicial or the unsolved killing of the victims, it admits responsibility on the question of the delay of justice. The Court took note of Guatemala's acquiescence.<sup>33</sup> This pattern is also depicted in 26 cases as the Ximenes Lopez (Brazil) case showed (see footnotes for additional details).<sup>34</sup>

**(2) When States acquiesce, they commit to controlling the Court proceedings and restore reputation damage.**

By using a positive discourse, States suggest high normative commitment to persuade the Court to accept their acquiescence. Guatemala satisfies the Court to accept its partial acquiescence in the Blake case affirming its responsibility for the delay of

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<sup>27</sup> Id., para. 23.

<sup>28</sup> Id., paras. 33, 43, 45 and 55.

<sup>29</sup> Id., paras. 39-40. Judge Cancado disapproves a restrictive view in his Separate Opinion, para.15.

<sup>30</sup> Id., para 33

<sup>31</sup> Ximenes-Lopes v. Brazil (Merits, Reparations and Costs) ICHR, 04 July 2006, Ser. C No. 149, para. 26

<sup>32</sup> Id., para. 27

<sup>33</sup> Id.

<sup>34</sup> Ximenes-Lopes, supra 31, paras. 34-6

justice.<sup>35</sup> This discourse looks positive before the Court since the State had previously objected and it changed its position by renouncing to dispute the proceedings.

In other cases, the discourse came directly from the highest AUTHORITIES. Even when the commitments cannot be ascribed to a particular administration, it is possible to compare the commitments that the State assumed during the Court proceedings with the concrete actions performed then with the judicial obligation. In the case of Guatemala, it is possible to compare it to a Guatemalan case from the second half of the 2000s when President Alfonso Portillo (2000-2004) started to commit to compliance reiteratively throughout acquiescence. In effect, he acknowledged the State's "international responsibility" in the Molina-Theissen case and various cases processed before the Commission.<sup>36</sup> He started to commit to compliance reiteratively throughout acquiescence. In the Tiu Tojín (Guatemala) case, the Vice-President of the Republic presided over a voluntary apology automatically after acquiescence.<sup>37</sup> President Portillo and his commitments were qualified as "a cynical course of manipulation" given his links to high AUTHORITIES of the civil war (1960 to 1996). These authorities were responsible for many massacres.<sup>38</sup>

On the contrary, the President Oscar Berger (2004-2008) was praised by his "open and proactive attitude" to work with HR victims and NGOs.<sup>39</sup> His commitments before the Court produced tangible results. These commitments were restricted to obligations (symbolic and reparations) in which the Court invoked the executive to comply with

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<sup>35</sup> Blake, *supra* 1, para. 27

<sup>36</sup> Molina-Theissen, *supra* 2, para. 7 and 10

<sup>37</sup> Tiu Tojín, *supra* 2, para. 5

<sup>38</sup> US Department. 2003. Country Report on HR Practices. Bureau of Democracy, HR, and Labor. February 25, 2004. <http://www.state.gov>. (April 28, 2009).

<sup>39</sup> Inter-American Dialogue. 2008. "National Dialogues on Democracy in Latin America. A Project of the Inter-American Dialogue and the Organization of American States." [www.thedialogue.org](http://www.thedialogue.org). (November 13, 2009). [Archive.thedialogue.org/.../NationalDialoguesGuatemalaEnglish.pdf](http://Archive.thedialogue.org/.../NationalDialoguesGuatemalaEnglish.pdf)

policy obligations. In fact, this administration was unpopular by the desire to prosecute corrupt politicians and AUTHORITIES.<sup>40</sup> President Álvaro Colom (2008-2012) continued making commitments but, AUTHORITIES and their protective networks prevented the implementation.<sup>41</sup> Finally, the president Otto Pérez Molina assumed office on January 14, 2012, to September 3, 2015; his administration limited the acquiescence since retired General head in the civil war,<sup>42</sup> can be found responsible for the Court judgments.<sup>43</sup>

These illustrations of the Guatemalan experience suggest the political leaders sign commitments due to their attempt to set domestic and international expectations of governmental responsibility and from a reputational standpoint, to increase it, due to the attention that particular Court cases have. Expectations and reputation are a source to attract support or criticism from other States. Indeed, regarding economic development, expectations and reputation would prevent capital flight and foreign investment. Commitments are, regardless that they fall into the emptiness, more feasible to generate expectations and reputation than compliance.

**(3) When States acquiesce, they reinforce their commitments with promises of compliance. This pattern is in 39 cases.**

Guatemala exhibited a conciliatory position at the end of the Blake proceedings. In this context, Guatemala reinforced its acquiescence with the following public

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<sup>40</sup> In "From Turmoil to Stability in Central America" LARRY JAY DIAMOND, et al., LATIN AMERICA'S STRUGGLE FOR DEMOCRACY 284 (Johns Hopkins Univ Pr. 2008).

<sup>41</sup> In fact, the Court needs to order provisional measures to the protection of victims and witnesses in Chang v. Guatemala case. Helen Mack Chang v. Guatemala (Provisional measures) ICHR, 26 August 2002.

<sup>42</sup> ALLAN D COOPER, THE GEOGRAPHY OF GENOCIDE 171 (University Press of America. 2009).

<sup>43</sup> Conclusions: HR violations, acts of violence and assignment of responsibility". Guatemala: Memory of Silence. Guatemalan Commission for Historical Clarification. Retrieved December 26, 2006.



declaration: “the government will try to heal the wounds of the past and will comply with the Court's ruling.”<sup>44</sup> In fact, during the reparation stage, the state indicated that acceptance for the unjustified delay in the administration of justice should be considered part of the non-pecuniary reparations. This promise seemed compatible with an additional statement in which the State reiterated its acquiescence and indicated, “efforts are being made to comply with two judicial arrest warrants and an accused has been captured.”<sup>45</sup> This reiteration occurred during the reparation stage and then during the first compliance report of Guatemala. Later, however, the State submitted statements of limited responsibility incompatible with its prior promises.

There are several examples that came from a variety of States, in which they make promises regarding the judicial obligation, particularly, prosecution and punishment (see footnotes for further details).<sup>46</sup> The consequence of persuasive discourse -including commitments and promises of compliance- is that the Court ends up by feeling less comfortable in rejecting acquiescence from States that are more likely, as they express in their promises, to offer to concede or appear compelled with their HR obligations. This seems to be the case of Guatemala, accordingly, the Court confers simultaneously legitimacy to the State actions and praises the expressions used in the acquiescence.

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<sup>44</sup> Wright-Smith, *The decision to comply: Patterns of compliance with the Inter-American Court of Human Rights* 149 (2011).

<sup>45</sup> Blake, *supra* 1, para. 60

<sup>46</sup> *Tiu Tojin*, *supra* 2, paras. 5 and 15); *Gutiérrez v. Colombia* (Merits, Reparations and Costs) ICHR, 12 September 2005, Ser. C No. 132, para. 92; *Huilca-Tecse v. Perú* (Merits, Reparations and Costs) ICHR, 3 March 2005, Ser. C No. 121, para. 20; *Benavides-Cevallos v. Ecuador* (Merits, Reparations and Costs) ICHR, 19 June 1998, Ser. C No. 38, para. 35; *Garrido and Baigorria v. Argentina* (Merits) ICHR, 2 February 1996, Ser. C No. 25, para. 24; *Bueno Alves v. Argentina* (Merits, Reparations and Costs) ICHR, 11 May 2007, Ser. C No. 164 para. 210; *Vargas v. Paraguay*.

**(4) The Court praises States for statements of responsibility rather than withholding praise until the State has complied, thus—incentivizing the use of acquiescence in a strategy. This pattern is part of 42 cases.**

On April 16, 1997, the State declared that “it accept[ed] international responsibility on the question of HR stemming from the delay of justice until the year nineteen hundred and ninety-five (1995) (originally in capitals) [...]”<sup>47</sup> The Court issued an order in which it takes note of the partial recognition of responsibility on the part of the State of Guatemala in this case.<sup>48</sup>

The Court offers praises in 75% of the cases, as Section A.1. However, among those instances in which the Court does not praise States we can find 5 demonstrated out of the 10 acquiescence cases in which Guatemala did not receive an appraisal.<sup>49</sup>

In the Blake case, the Court did not emphasize appraisals, perhaps since the State makes an extra declaration (after the acquiescence) saying, “[t]his acknowledgment was independent of the outcome of the proceeding in the domestic courts, [...]”<sup>50</sup> Despite there being a marked tendency to praise, the Court can limit such praises based on frequency of interaction and nature of relationship between the government and the Court. For instance, the Court can put attention before praising on the amount of government litigation pending before it. Accordingly, the withholding of praises could be explained in the high number of cases before the System of Guatemala (10 out of 56 cases - equivalent to an 18%).

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<sup>47</sup> Blake, supra 1, paras. 27-8

<sup>48</sup> Id., para. 29

<sup>49</sup> Guatemala did not receive praises in Blake, Maritza Urrutia, Bamaca Fernandez, Myrna Mack, and Chitay Nech cases. See as examples: Blake, supra 1, para. 89 and Maritza Urrutia, supra 2, para. 42

<sup>50</sup> Blake, supra 1, paras. 27-8

The withholding also could be explained in the poor overall compliance of Guatemala (36%). Thus, the Court could doubt the State's capacity to respond effectively with the judgment. In addition, nature of relationship could count for the Court; for example, history of relations with Guatemala can be taking into account. Given the civil war that marked 34 years of the Guatemala history,<sup>51</sup> commitment to HR could not be one of the State priorities; rather, it was economic growth. Thus, it appears rational that the Court withheld praise from States seeking to improve their reputation in order to encourage more serious, long-term HR commitments.

The withholding of praise also was applied to Colombia in 3 out of its 9 acquiescence cases and to Paraguay in 3 of 5. Recall, however, that the Court acts idealistically according to my results, thus, praising is the generalizable practice. For example, in the *Escue Zapata* (Colombia) case, the Court stated in its Judgment on Merits, Reparations and Costs "acquiesce is a positive contribution toward the proper fulfillment of the Inter-American HR jurisdictional function and, in general, the enforcement and the effectiveness of the principles enshrined by the American Convention."<sup>52</sup> Likewise, in the *Zambrano-Velez* (Ecuador) case the Court in its Judgment on Merits, Reparations and Costs remarks the value of acquiesces, particularly, "[...as a] positive step toward the vindication of the victims' memory and dignity."<sup>53</sup>

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<sup>51</sup> Martínez, Francisco Mauricio (2010). *Medio siglo de la rebelión*. Prensa Libre (Guatemala). [Alternativatinomaerica.blogspot.com](http://Alternativatinomaerica.blogspot.com). Archivado desde el original el 3 de diciembre de 2015.

<sup>52</sup> *Escue Zapata v. Colombia*, (Merits, Reparations and Costs) ICHR, 4 July 2007, Ser. C, No. 165, par. 20.

<sup>53</sup> *Zambrano Velez v. Ecuador* (Merits, Reparations and Costs) ICHR, 4 July 2007, Ser. C No. 166, para. 10.

Other useful illustrations came from those States received recurrently praises such as those that I called powerful (Brazil) and rogue<sup>54</sup> (Venezuela). For example, in the Ximenes Lopes (Brazil) case the Court stated in its Judgment on Merits “acknowledgment of international responsibility is a positive contribution to the outcome of the [...] case and to the effectiveness of the principles which have inspired the American Convention [...]”<sup>55</sup> In the Montero-Aranguren (Venezuela) case the Court stated “acknowledgment of international responsibility made by the State during the proceeding before this Court constitutes an important step towards the development of this process.”<sup>56</sup> The Court adds concerning Venezuela that its acquiescence is “undoubtedly one of the most complete that this Inter-American Court has notice have.”<sup>57</sup>

**b) Stage 2. Exchange —requests**

**(1) When States acquiesce, they request to control the proceedings and preempt future reputation damage. This pattern is in 30 cases.**

In the Blake proceedings, Guatemala tried to suspend the oral proceedings to avoid incriminating and accusatory information against those AUTHORITIES responsible of the crimes that came to the public light and tried to gain six months to reach an agreement in order to close the case prematurely.<sup>58</sup> It was likely that through these requests the State of Guatemala would be preserving impunity for responsible

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<sup>54</sup> Rogue States are those that are seeking to threaten global stability. These states generally have authoritarian governments guilty of HR abuses, sponsor terrorism, and are seeking to acquire weapons of mass destruction. The term is controversial.

<sup>55</sup> Ximenes Lopez, *supra* 31, para. 80

<sup>56</sup> Montero-Aranguren (Detention Center of Catia) v. Venezuela, (Objection, Merits, Reparations and Costs) ICHR, 4 July 2006, Ser. C, No. 15o, para. 57

<sup>57</sup> *Id.*, para. 58

<sup>58</sup> Blake, *supra* 1, para. 27 number 4 "It respectfully request[ed] the Honorable Court to suspend the oral proceedings and grant it a term of six months to reach an agreement on reparations with the victims' next of kin and/or the Commission"

AUTHORITIES. The Court decided to continue with hearings<sup>59</sup> and officially recorded evidence that includes the responsibility of AUTHORITIES as perpetrators of the crime and the existence of a systematic cover-up for them. Then, the Court can order a judicial obligation based on narratives that include information provided by oral proceedings.<sup>60</sup>

These requests, as anticipated in the previous section, are destined to frame the litigation by closing the merits phase of the case,<sup>61</sup> restricting the Court hearings,<sup>62</sup> or ceasing the controversy of the facts.<sup>63</sup> Moreover, the Court can also decide to adopt any of these three actions without requests.<sup>64</sup> In other cases, States managed agreements to restrict the controversy and control outcomes.<sup>65</sup>

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<sup>59</sup> Id., para. 29

<sup>60</sup> Id., considering 35

<sup>61</sup> *Aloeboete v. Suriname*, (Merits) ICHR, 4 December 1991, Ser. C No. 11, para. 22 (In *Aloeboete* after two declarations of acquiescence by Suriname, the State Agent declared during the Court proceedings as appears in the Judgment on Merits "I believe my statement was clear: it accepts responsibility. Consequently, the Court has the right to close the case, file it [...]").

<sup>62</sup> *Acosta-Calderón v. Ecuador* (Merits, Reparations and Costs) ICHR 24 June 2005, paras 24, 25; *Carpio Nicolle*, supra 2, para. 36(b); *Trujillo Oroza v. Bolivia* (Merits) ICHR, 26 January 2000, Ser. C No. 64, para. 40; *Bulacio v. Argentina* (Merits, Reparations and Costs) ICHR, 18 September 2003, Ser. C No. 100, para. 21, 27; and *Mariparán Massacre v. Colombia* (Merits, Reparations, and Costs) ICHR, 15 September 2005, para. 33 (4) (In these cases, States asked the Court, to obviate or suspend the hearing (often - in application of the procedural economy principle) and continue on to establish the corresponding measures of reparation).

<sup>63</sup> *Huilca Tecse*, supra 47, para. 20; *Barrios Altos v. Peru* (Merits) ICHR, 14 March 2001, Ser. C No. 75 para. 38; *Trujillo Oroza* id., para. 40; *Garrido*, supra 47, paras. 22, 27 (the parties given their statements at the public hearing and their acquiescence consider that it is possible to assert that the dispute concerning the facts ceased. That the controversy between the State and the parties ceased, makes feasible to open the reparations stage. In this way, these processes were reduced)

<sup>64</sup> *Gómez Palomino v. Peru* (Merits, Reparations and Costs) ICHR 22 November 2005, Ser. C No. 136 para. 16; *Baldeón García v. Peru* (Merits, Reparations and Costs) ICHR, 6 April 2006, Ser. C No. 147, paras. 26, 45 (In these cases, the Court indicated that it was not necessary to convene a public hearing); *El Amparo v. Venezuela* (Merits) ICHR, 18 January 1995, Ser. C No 19, para. 19 (the Court took note of the acquiescence [...]) and decided that the controversy concerning the facts that originated the case has ceased).

<sup>65</sup> Id., (amparo) paras. 1 and 3 (the State accepted responsibility and asked the Court's permission to negotiate reparations directly with the Commission.) Consequently, by judgment dated January 18, 1995, (the Court took note of the acquiescence of responsibility [...]) and decided that the controversy concerning the facts that originated the case has ceased). (Additionally, it granted the parties a period of six months to reach an agreement on reparations). See the same in the following cases: *Benavides-Cevallos*, supra 47, para. 35; *Blanco Romero v. Venezuela* (Merits, Reparations and Costs) ICHR, 28 November 2005, Ser. C No. 138, para. 27; *Garrido and Baigorria*, supra 47, para. 28; *Huilca-*

**c) Stage 3. Negotiation—statements of limited responsibility and nonintervention and anticipatory remedial actions.**

**(1) When States acquiesce, they make statements in order to limit their responsibility and to avoid the Court intrusiveness by nonintervention statements. This pattern was incarnated in 49 of the 56 cases with acquiescence.**

In the Blake case, the State acquiesced and then declared that its acquiescence is “independent of the outcome of the proceeding in the domestic court[s].”<sup>66</sup> This statement could eventually be considered as a kind of anticipatory statement of limited responsibility. In fact, it was, since the State submitted a statement of limited responsibility during the stage of reparations. By which the State stated, “the time that passed since the crime occurred, finding responsible or the remains of the victim would be challenging and expensive.”<sup>67</sup> This especially happens when the whereabouts of the suspects were unknown.<sup>68</sup> Even later, the State adduced that its lack of capacity makes that noncompliance occurs by a series of “structural problems.”<sup>69</sup> To limit, even more, its responsibility, Guatemala affirms that the Court has observed on the State without taking into account the political, economic and social reality of Guatemala and its process of building a democratic State of law comes from 1985.<sup>70</sup> The Blake case regarding statements of limited responsibility is supplemented by the Kawas Fernández (Honduras) case.<sup>71</sup>

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Tecse, *supra* 47, para. 44; Molina-Theissen, *supra* 2, para. 7 and 10; Tiu Tojín, *supra* 2, para. 5; Vargas-Areco, *supra* 47, para. 10.

<sup>66</sup> Blake, *supra* 1, para. 27

<sup>67</sup> *Id.*, para. 8 and 11

<sup>68</sup> *Id.*, para. 15

<sup>69</sup> *Id.*, para. 32

<sup>70</sup> *Id.*

<sup>71</sup> Kawas-Fernández v. Honduras (Merits, Reparations and Costs) ICHR, 3 April 2009, para. 60.

Regarding the statement of nonintervention, Guatemala used them in the Blake case. In such, the State questioned the Court authority. In addition, regarding its obligation to investigate the responsibility committed by its agents,<sup>72</sup> the State remarked that there is no negligence in the exercise of the public functions. This statement validated actions and omissions of judges. The Court considered that this new position of the State emptied the content of its acquiescence.<sup>73</sup> The State identifies the behavior of judges as a structural obstacle<sup>74</sup> that serves to protect AUTHORITIES from ordered prosecutions. In response, the Court established the responsibility of judicial AUTHORITIES. The Court stated that these AUTHORITIES are a factor for impunity since they tolerate, without adopted provisions against, the abuse of means to delay and obstruct the proceedings.<sup>75</sup>

Chapter 3 established that judiciaries play one of the most influential roles to protect leading AUTHORITIES in two ways. Judges receive pressure from their executives to require noncompliance with the ICHR judgment or obstruct the implementation since the ICHR order threatens them. Peru and Venezuela accused the Court of violating the principle of non-intervention by alluding to judgments by its domestic Courts. These statements contributed to a strategy to retract the given acquiescence in Peruvian and Venezuelan cases (see references for illustrations).<sup>76</sup>

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<sup>72</sup> Blake v. Guatemala, supra 1 para. 2

<sup>73</sup> Id., para. 14

<sup>74</sup> Blake, supra 1, para. 32

<sup>75</sup> Id., para. 40

<sup>76</sup> Huilca-Tecse, supra 47, para. 30, 32; Loayza Tamayo v. Perú (Monitoring) ICHR, 17 November 1999, Ser. C No. 60, para. 9; Castillo Petrucci v. Perú (Objections) ICHR, 4 Sept 1998, Ser. C No. 41, para. 100 (a); Castillo Petrucci v. Perú, (Merits) ICHR, 30 May 1999, Ser. C No. 52, at 67, Ratio Decidendi clause 14, and para. 216 (f); Id., supra 26, at 24, par. 100 (a) (Sept. 4, 1998). Montero Aranguren, supra 57 paras. 57-8; Apitz v. Venezuela (Monitoring) ICHR, 23 November 2012, para 13 (IX). Another examples came from Garrido and Baigorria, supra 47, para. 34; Caballero Delgado and Santana v. Colombia (Merits) ICHR, 8 December 1995, Ser. C No. 22, para. 27; Ximenes Lopes, supra

**(2) When States acquiesce, they remedy anticipatorily in order to control the outcome or intense obligations**

In the Blake case, Guatemala “respectfully request[ed] the Honorable Court to [...] reach an agreement on reparations [...]”<sup>77</sup> There are variety of anticipatory remedial actions such as in the Ximenes Lopes (Brazil) case; the State undertook measures to improve conditions in certain mental health centers well before the judgment demanded it to do so.<sup>78</sup> The Benavides Cevallos (Ecuador) case, the State ratified the Inter-American Convention on Forced Disappearances of Persons voluntarily.<sup>79</sup> In the Barrios Altos (Peru) case, the State reached an agreement with victims to promote ratification of the International Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.<sup>80</sup>

An illustration of symbolic remedial is Mariparan massacre (Colombia) case. During its public proceedings, Colombia reasserts its State policy is that of promoting and protecting HR and it expresses its deep respect and sympathy for the victims of the facts that took place in Mapiripán in July 1997 and remembering them it expresses its regret and apologizes to their next of kin and Colombian society.<sup>81</sup> In the Montero Aranguren (Venezuela) case, at the public hearing for the Case, after acquiescing full responsibility, Venezuela asked for a moment of silence in memory of the victims and

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31, para. 63 e)

<sup>77</sup> Blake, supra 1, para. 27 (4). See as supplementary cases El Amparo, supra 65, para. 19; considering 1 and 3 (Acquiescence is presented with remedial actions, by unilaterally committing or managing relationships/agreements either with other parties in or outside the process. In Venezuela’s Amparo case, the State acquiesced and asked the Court’s permission to negotiate reparations directly with the Commission. The Court granted the parties a period of six months to reach an agreement on reparations; see footnote concerning other cases in which the States managed agreements to control financial reparations Id., supra 66

<sup>78</sup> Ximenes Lopes , supra 31

<sup>79</sup> Benavides Cevallos, supra 47, para. 52

<sup>80</sup> Barrios Altos, supra 64, para. 44c)

<sup>81</sup> Mariparán, supra 63, para. 33 (3)



expressed its deepest regrets for all pain they had endured.<sup>82</sup> The Court has highly valued the State action as one of the *most ample* acquiescence made in the system.<sup>83</sup>

## **B. The shape of compliance**

Cases with acquiescence differ as to how well the strategies in the three previous Stages have worked. Therefore, it is possible to track the strategy and its effects on compliance. This section exhibits illustrations about the rigor of the judicial obligation and the type of monitoring that shaped the compliance along with examples of State and Court actions during the monitoring as key patterns of Stage 4 and 5. There are five key patterns on Stage 4 and 5 that are presented separately.

### **1. Stage 4: Monitoring and its key patterns — restrictions and limitations on investigations and prosecutions and demands for compliance**

#### **a) When States acquiesce — the Court diminishes both judicial obligation and monitoring**

When there is acquiescence, the rigor of the judicial obligation is diminished. In the Blake case, the Court ordered a diminished obligation to the State when it stated, “it must adequately investigate, prosecute, try and convict those that committed these HR violations and took measures to prevent future violations.”<sup>84</sup> Once presented, this pattern is visible in comparison with a case in which there is no acquiescence. For instance, in the Garibaldi (Brazil) case, there is no acquiescence and the intensity applied by the Court in its obligation to prosecute was extended to functional misconduct.<sup>85</sup>

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<sup>82</sup> Montero Aranguren, *supra* 57, para. 42.

<sup>83</sup> *Id.*, paras. 57 and 150

<sup>84</sup> Blake, *supra* 1, para. 64

<sup>85</sup> Garibaldi v. Brazil, Judgment of September 23, 2009, (Objections, Merits, Reparations, and Costs) para. 169

Chapter 3 notes that the Court rewards the States with a diminished monitoring. A diminished monitoring translates in that the Court gives States that acquiesce more time to act without intervention, delaying control processes and monitoring less frequently. The above is illustrated with the El Amparo (Venezuela) case in which the State acquiesced; the first monitoring judgment was issued six years after the issuance date for the Judgment on Reparations and Costs. In contrast, in the Duran Ugarte (Peru) case and the Sawhoyamaxa Community (Paraguay) case in which the States did not acquiesce their first monitoring judgments were issued within a year.<sup>86</sup> *For instance, monitoring judgments were issued every four years in the Blake (Guatemala) case in which State acquiesced.* Conversely, the monitoring judgments were issued every two months in the Sawhoyamaxa (Paraguay).<sup>87</sup> These differences in the number of the monitoring judgment occurrences can be seen in comparing the 1 monitoring judgment in the Benavides Cevallos (Ecuador) case with acquiescence with the nine monitoring judgments in the Baena (Panama) case without it.<sup>88</sup>

**b) When States acquiesce, they try to release their AUTHORITIES from prosecutions by complying with non-judicial obligations and by means to exonerate the authority of guilt and obstacles of law.**

Delving into how Guatemala has shaped its compliance in the Blake case the Guatemala State reported full compliance with non-judicial obligations on March 30,

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<sup>86</sup> Amparo v. Venezuela (Monitoring), ICHR, 28 November 2002; Duran Ugarte v. Peru (Monitoring), ICHR, 27 November 2002; Sawhoyamaxa Community v. Paraguay (Monitoring), ICHR, 2 February 2007

<sup>87</sup> Id; Sawhoyamaxa Community v. Paraguay (Monitoring), ICHR, 14 December 2007; Sawhoyamaxa (Monitoring), ICHR, 8 February 2008; Sawhoyamaxa (Monitoring), ICHR, 20 May 2009; Sawhoyamaxa (Monitoring), ICHR, 24 June 2015.

<sup>88</sup> Benavides Cevallos v. Ecuador (Monitoring), ICHR, 27 November 2003; Baena v. Panama (Monitoring), ICHR, nine monitoring orders from 21 June 2002 to 28 May 2010

2000.<sup>89</sup> This positive behavior regarding compliance with the ordered reparation could deflect attention from its lack of complying with the judicial duty.

On May 7, 2004, and on August 17, 2005, after the State highlighted the Cifuentes Lopez conviction - one of the ten that received superior orders for perpetrating the execution in the Blake case - the State emphasized its incapacity to establish the whereabouts of the remaining perpetrators since they fled away from the country.<sup>90</sup> In consequence, the AUTHORITIES that directed the crime as masterminds hold the power to ensure their impunities. The impunity is not surprising given that a comparable situation exists in another case led by the Court.<sup>91</sup>

Indeed, ten years later, on May 16, 2014, the State objected to the lack of jurisdiction of the Court and noted that the facts of the Blake case fell on the Reconciliation Law. By this action, AUTHORITIES remain exonerated from guilt at the domestic level.<sup>92</sup> On May 5, 2015, the State actions also considered the use of law obstacles, especially amnesties (based on the National Reconciliation Act), secrecy (military reluctance to give information about perpetrators) and delaying procedural tactics. All of them remain being used to conserve a structural impunity as a report of the Public Prosecutor Office noted.<sup>93</sup> This report also emphasized others "structural problems" in Guatemala. These problems impede the investigation of the Court cases such as limitations on hiring public officials, lack of support from the National Civil Police<sup>94</sup> and arbitrary suspension of judges.<sup>95</sup>

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<sup>89</sup> Blake, *supra* 1, para considering 6)

<sup>90</sup> *Id.*

<sup>91</sup> Myrna Mack, *supra* 2, para. 216

<sup>92</sup> 12 Guatemalan's Cases, *supra* 1, para. 2

<sup>93</sup> *Id.*, para. 32

<sup>94</sup> *Id.*, para. 32

The current arbitrary suspension of magistrates is neither an unexpected nor an astonishing event since AUTHORITIES and their network of protection tend to thwart the work of domestic institutions. It happened when executives, judiciaries, and prosecutors were required to coordinate their works to comply with the Court mandates and often these actions go against AUTHORITIES. Therefore, even when some judges and prosecutors wish for an end to impunity, the continued military influence, the corruption, and clandestine organizations pose considerable impediments to judges and prosecutors. In fact, the Court has issued protective measures by threats to judges and prosecutors and witnesses (more than 15 to Guatemala).<sup>96</sup> On August 16, 1995, the Court ordered Guatemala to adopt measures of protection in the Blake case.<sup>97</sup> On April 18, 1997, it called to extend the provisional measures.<sup>98</sup> Paradoxically, despite at it all, on October 2015, the State requested the Court that its efforts destined to comply its judicial obligations be evaluated in a positive way.<sup>99</sup>

**c) When States acquiesce — the Court increases its demands for compliance.**

**This pattern is noted in 22 cases with demands.**

In the Blake case, the Court uses one of its most typical time reminders “[t]hat approximately *twenty-three* years have gone by since the occurrence of the facts of the instant case, and more than nine since the rendering of the Judgments on the merits, reparations and costs by the Court [...] Consequently, the Court notices with concern that, from the information contributed by Guatemala, it cannot be concluded that the State has

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<sup>95</sup> Id., para. 32

<sup>96</sup> Carpio, *supra* 2; Myrna Mack-Chang, *supra* 2; Bámaca-Velásquez, *supra* 2.

<sup>97</sup> Blake v. Guatemala (Provisional Measures) ICHR, 16 August 1995, Ser. E, “Whereas” 3, Decides 1 and 3; Blake v. Guatemala (Provisional Measures) ICHR, 2 Sept. 1995, Ser. E, decidendi 1 and 2

<sup>98</sup> Blake v. Guatemala (Provisional Measures) ICHR, 18 April 1997, decidendi 2.

<sup>99</sup> 12 Guatemalan’s Cases, *supra* 1, para. 33

adopted the measures necessary to completely comply with what has been ordered by the Inter-American Court.”<sup>100</sup>

It is similar to when “the Court reminds that upon proceedings on the merits of the case, more than fourteen years ago, the States acknowledged its international responsibility for the violation of the HR of [...]”<sup>101</sup> Another time reminder is: “the acknowledgment of responsibility made by the States should be translated into prompt [...] compliance with the orders of the Court by means of reparation measures. The States should be consistent with the acknowledgment made [...].”<sup>102</sup>

The Court has repeatedly stated the Vienna Convention that indicates that no domestic law may prevent a State from complying with its international obligations.<sup>103</sup> When prescription is alleged, the Court reminds the States that certain crimes – like disappearances, extrajudicial executions, and torture – are never subject to a statute of limitations.<sup>104</sup> When non in bis in idem or res judicata is alleged in cases against Peru, the Court asserts that no domestic case can be used to dismiss or absolve those responsible

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<sup>100</sup> Blake v. Guatemala, supra 1, para. 9

<sup>101</sup> El Amparo, supra 88, para. 20; El Amparo v. Venezuela (Monitoring) ICHR, 4 February 2010, para. 13.

<sup>102</sup> El Amparo, Id., para. 14; Molina Theissen v. Guatemala (Monitoring) 16 November 2009, Considering clause No. 18; Trujillo Oroza v. Bolivia (Monitoring) 16 November 2009, Considering clause No. 51, and Case of Montero- Aranguren (Detention Center of Catia) v. Venezuela (Monitoring) 17 November 2009, Considering clause No. 14 and Considering Clause 7. There more reminders in cases such as: Molina Theissen, id, Considering Clause 18; Case of Tiu Tojín v. Guatemala (Monitoring) 16 May 2011, Considering Clause 11; and El Amparo, supra 103 Considering Clause 4; Vargas Areco v. Paraguay (Monitoring), ICHR, 24 November 2010, para 9; Trujillo Orozca v. Bolivia (Monitoring) ICHR, 12 September 2005, considering para. 4 (e); Bueno Alves v. Argentina (Monitoring) ICHR, 5 July 2011, considering paras 21-3; Vargas Areco v. Paraguay (Monitoring), ICHR, 30 October 2008, para. 20; Vargas Areco, id, para. 156; Vargas Areco, id, para. 11; Manuel Cepeda Vargas v. Colombia (Merits, Reparations, and Costs), ICHR, 26 May 2010, Ser. C, No. 213, para 216d; Barrios Altos, supra 64, para. 41, operative para. 4; Vargas Areco, supra 47, para. 156; Manuel Cepeda Vargas, id, para. 156; Vargas Areco, supra 47, para. 156; Manuel Cepeda Vargas, id, para. 156.

<sup>103</sup> Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27, 23 May 29169, entered into forcé 27 January 1988, Art. 27.

<sup>104</sup> Convention of the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, UN General Assembly Resolution 2391 (XXIII), entered into force 11 November 1970. The following OAS members have ratified the Convention: Argentina, Bolivia, Costa Rica, Cuba, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Vincent and Grenadines, Uruguay.

for HR violations.<sup>105</sup> In dealing with Guatemala, the Court reiterates that contaminated domestic judgments (by defects) do not excuse the States from its ICHR-issued obligation to investigate, prosecute and punish.<sup>106</sup>

## **2. Stage 5: Sanctioning and its key patterns — enforcement by overreaching and reporting.**

### **a) When States acquiesce — the Court slightly increases the issuance of enforcement measures. This pattern was embodied in 23 of the 56 cases with acquiescence.**

#### **(1) Reporting**

The Court reported 41% of the cases with acquiescence to the General Assembly of the Organization of American States (GA of OAS). The Blake case has not been considered in these reported cases even when the current rate of compliance of the Blake case is less than 50% after 16 years under monitoring. This pattern will be illustrated with some other instances.

In Benavides Cevallos (Ecuador) case, the acquiescence appears with a friendly settlement and two commitments: to spread/clarify the truth and to comply with judicial obligation. However, Ecuador has paid the financial reparation ordered by the Court, but it refused to comply with the judicial obligation alluding statute barred. Accordingly, the Court decides to inform the GA, in the application of Article 65 of the AC, about the failure of Ecuador to comply with investigating, prosecuting and punishing all those

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<sup>105</sup> La Cantuta v. Peru (Merits, Reparations and Costs) ICHR, 26 November 2006, Ser. C No 162, para. 180; Ivcher Bronstein v. Peru (Merits, Reparations and Costs) ICHR, 06 February 2001, Ser. C No 74, considering para 14; Gelman v. Uruguay (Merits, Reparations and Costs) ICHR, 24 February 2011, Ser. C No 221, para. 226; Barrios Altos, supra 64, para. 41; Id., para. 41; Gelman v. Uruguay, id, para. 226; Benavides Cevallos supra 47, para, decides 3.

<sup>106</sup> Carpio Nicolle, supra 2, para. 132

responsible for the HR violations committed to the detriment of Consuelo Benavides according to the judgment of June 19, 1998.<sup>107</sup>

Consequently, the Court included a resolution detailing Ecuador's noncompliance in its yearly report (2003), which it expected to present to the GA of the OAS.<sup>108</sup> The GA is empowered to examine the report and adopt political measures against the State. However, the GA never officially discussed the report. The GA inaction weakened the Court's ability to command enforcement of its judgments. The inter-state lobbying that prevents that the GA censures States that do not comply in full with Court judgments needs to be finished.

## **(2) Appealing**

Recall that this action consists in making a formal appeal to others Court members or at higher levels of the Organization. With this opinion, the Judge Eduardo Vio Grossi, in his Concurring Opinion noted, "in keeping with the relevant norms and in view of the extended, and consequently more than prudent or reasonable, time that has elapsed since the delivery of the judgment in this case without the State concerned [...] having complied with its fundamental elements, the Inter-American Court of HR [...] must advise the General Assembly of the Organization of American States [...] of this situation."<sup>109</sup> Also, it was established in the appealing, "[...(e)] it is not admissible to transform the regulatory mechanism of monitoring compliance with a "final and non-appealable" judgment, into the prolongation of the cas[e...]."<sup>110</sup>

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<sup>107</sup> Benavides Cevallos v. Ecuador (Monitoring Compliance) ICHR, 27 November 2003, decidendi 3.; Annual Report 2003 – Chapter III <[www.cidh.org/annualrep/2003eng/chap.3k.htm](http://www.cidh.org/annualrep/2003eng/chap.3k.htm)>

<sup>108</sup> Id.

<sup>109</sup> El Amparo v. Venezuela (Monitoring) ICHR, 20 February 2012, Concurring Opinion of Judge Eduardo Vio Grossi, para: 1(e)

<sup>110</sup> Id.

### **(3) Overreaching the quasi-judicial review**

Overreaching occurs when a Court order enlarges the scope of a judicial obligation. For example, in the Blake case, on January 22, 1999, the Court issued its judgment on Reparations and Costs. In this judgment the Court ordered the State to effectively investigate, prosecute, try and convict those that committed these HR violations and take measures to prevent future violations. Sixteen years later, the Court expanded this obligation through a monitoring judgment ordering the duty to remove all obstacles and mechanisms of fact and law that keep impunity. Eradicating the impunity is a task that was not considered in the judgment on reparations and costs.

Considering the Blake case, in twelve cases of Guatemala, the Court dictates a new mandatory course that the State needs to follow to comply with the judicial obligation. This mandatory course of actions includes ten diverse activities that overreach the original requirement. These new obligations include that the State cannot invoke as a defense of its duty to investigate judgments in proceedings that have not met the American Convention standards. Another is that the AUTHORITIES of the State cannot resort to four mechanisms: the secret of the State, confidentiality of the information, reasons for public interest and national security to not supply the information required by the judicial or administrative AUTHORITIES in charge of the outstanding investigations or proceedings ordered by the Court. It is also set to additional action that judges must manage the proceedings to avoid that judicial means delay or hinder the process. The twelve cases are: Blake, Villagrán, Bámaca, Mack Chang, Maritza Urrutia, Plan Sánchez Massacre, Molina Theissen, Carpio, Tiu Tojín, Dos Erres Massacre and Chitay Nech.<sup>111</sup>

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<sup>111</sup> 12 Guatemalan's Cases, *supra* 1, para. 40



Aside of these twelve measures; the Court used these kinds of enforcements on more than one occasion, for example in Molina<sup>112</sup> and Carpio (Guatemala) cases.<sup>113</sup> The remaining illustrations in which the Court overreaches the quasi-judicial review are Cardenas, Servellon Garcia, Moiwana, Montero, Amparo and Blanco.<sup>114</sup>

## **VI. EXCEPTIONS TO KEY PATTERNS**

There are three exceptions to the relationship between acquiescence and lower compliance. These exceptions indicate that this interpretation concerning AUTHORITIES is on the right track. The first relates to cases in which States did not acquiesce before providing protection to AUTHORITIES. This exception is a first indication that this interpretation concerning AUTHORITIES is on the right track because States request a change in the Court decisions to protect their AUTHORITIES. The second and third exceptions relate to cases in which there is a relationship between acquiescence and higher (rather than low) compliance. The presented interpretation on the protection of AUTHORITIES is accurate since most exceptions to the relationship acquiescence-lower compliance are explainable for a change in the type of AUTHORITIES or type of victims affected by AUTHORITIES. Moreover, the interpretation is correct since the lower level of compliance in cases without acquiescence is also explainable by the presence of AUTHORITIES.

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<sup>112</sup> Molina Theissen, supra 104, paras. 25-33, decidendi 2-3.

<sup>113</sup> Carpio Nicolle v. Guatemala (Monitoring) ICHR, 1 July 2009, para. 18

<sup>114</sup> Ibsen Cardenas v. Bolivia (Monitoring) ICHR, 14 May 2013, paras 11-2; Servellón García v. Honduras (Monitoring) ICHR, 22 November 2011, para. 10; Moiwana v. Suriname (Monitoring) ICHR, 21 November 2007, para. 2 (a); Montero Aranguren, supra 104 para. 22; El Amparo v. Venezuela (Monitoring) ICHR, 18 December 2009, paras. 9-10; Blanco Romero v. Venezuela (Monitoring) ICHR, 22 November 2011, paras. 10-11.

### **A. States request a change in the Court decisions**

There are few instances in which States claim an amendment to the Court rulings. Since the use of this alternative presupposes an interest in maintaining the structural impunity – an entrenched policy of protection – on the executive's part of a powerful State (Brazil) or that has the support from a powerful State (Peru about U.S). Even when not all the members States of Inter-American HR System are in a situation of power, this alternative shows the behaviors/actions of high AUTHORITIES in protecting themselves or another AUTHORITY. Gomes Lund, the Bello Monte, and the Castro-Castro cases are instances that illustrate when AUTHORITIES seek protection. In these instances, the top AUTHORITIES of the State (Rousseff's actions and Garcia's declarations) exert an explicit political pressure to push the Court to accept their request. The Court's original decisions negotiated down after the ICHR considered presidential expressions make the Court rulings substitutable, compliance negotiable and the impunity possible.

#### **1. The Brazil cases**

Rather than reputation, the goal is to protect Brazil's stature as a rising global hegemon. Without incentives to comply with the ICHR, making the difference between impunity in perpetuity and justice is not a priority for the administration of President Luiz Inácio Lula da Silva (Lula) and its current President Dilma Rousseff (Dilma).

In the Gomes Lund case (November 2010), 70 members of the Communist Party of Brazil were detained, tortured and disappeared by the Brazilian Army between 1972-75 in the context of the military dictatorship that sought to eradicate the Guerrilha do

Araguaia.<sup>115</sup> The Law No. 6.683/79 and a series of the legislative and administrative measures were applied to restrict the criminal investigation of the responsible parties and the information as well helps with the impunity.<sup>116</sup> Thus, the Court ordered Brazil to dismantle its policies of providing amnesties for HR violators during the dictatorship in the 1960s–1980s.<sup>117</sup> This possibility was contentious because Brazil refusing to invalidate its amnesty laws,<sup>118</sup> while domestically prosecuting HR violators gained the support of the Minister of the Supreme Tribunal. Despite this, he still retracted his support, saying it was not for him to change amnesty laws.<sup>119</sup> Lula and his successor were unwilling to lead judges and legislators to change amnesty laws as from top-down their AUTHORITIES were exposed to prosecutions, including themselves. As a result, the Court has had zero effect on Brazil’s approach toward accountability.<sup>120</sup>

In fact, in another Brazilian case, on April 1, 2011, the ICHR ordered the suspension of the Bello Monte hydroelectric plant’s license and construction by its impact on [11 specified] indigenous communities. With this measure, the Court questioned the legality of the actions of Lula as the highest-ranking political authority and leader of the Bello Monte project, jeopardizing his reputation and responsibility, which included his allies, among them Dilma that became president with Lula support. Before the issuance of the Court decision, Dilma intervened to protect Lula when she announced in her inaugural address on January 1, 2011, that the Belo Monte Dam Complex, an anchor project in Lula’s 2007 investment plan, was essential for Brazilian

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<sup>115</sup> Gomes Lund v. Brazil (Objections, Merits, Reparations, and Costs) ICHR, 24 November 2010, paras. 88 and 89

<sup>116</sup> *Id.*, para. 2

<sup>117</sup> *Id.*, para. 325

<sup>118</sup> *Id.*, para. 126. Barrios Alto, *supra* 64, para. 41; Gelman, *supra* 107, para. 226

<sup>119</sup> Wayne Sandholtz & Mariana Rangel Padilla, *Juggling Rights, Juggling Politics: Amnesty Laws and the Inter-American Court*, 32.

<sup>120</sup> *id.* at.

development. After the Court decision, Brazil claimed that the measures were "precipitous and unwarranted," including the Senate support that called them "[so] absurd that it even threatens Brazilian sovereignty."<sup>121</sup> To pressure a change in the decision, Brazil severed formal relations with the Commission, recalled its OAS ambassador, and froze, as the third largest contributor to the OAS budget, its annual contribution, on which the ICHR is dependent.<sup>122</sup> On July 29, 2011, the ICHR changed its decision saying that it went beyond the scope of precautionary measures.<sup>123</sup> In consequence, the mega project ultimately became a sign of forcible concession of the Court to political-economic pressures by the Dilma administration given the entrenched policy to protect AUTHORITIES.

## **2. The Peru case**

Unlike Brazil, Peru is not a powerful State, however, it had the support of a hegemon like U.S. A reason that explains why for a long time Peru has lacked incentives to comply with the ICHR and be concerned with international legitimacy, particularly under Fujimori administration.<sup>124</sup> U.S. policies toward Peru were destined to block drug exports since the mid-1990s.<sup>125</sup> The U.S strategic support and its close relationship with the Fujimori government rendered irrelevant the temporary paralyzation of military aid after Fujimori's 1992 autogolpe and his unconstitutional 2000 election.<sup>126</sup> In fact, Fujimori used the U.S strategic support instead to fighting necessarily against drug

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<sup>121</sup> ALSTON & GOODMAN, *International Human Rights* 996. 2013.

<sup>122</sup> *Id.* at. 996

<sup>123</sup> *Id.* at. 996

<sup>124</sup> Inter-American Commission on HR. 1998. "Country Report: Peru." [www.cidh.oas.org](http://www.cidh.oas.org). (July 17, 2007).

<sup>125</sup> Wright-Smith, *The decision to comply: Patterns of compliance with the Inter-American Court of Human Rights* 252. 2011.

<sup>126</sup> *Id.* at. 251

exports, to sacrifice all HR guarantees<sup>127</sup> and torturing, executing, and disappearances in its efforts to combat Sendero Luminoso during the mid-to-late 1990s.<sup>128</sup> By 1995 amnesty law, political AUTHORITIES and militaries, especially, high-ranking responsible ones were protected, after its derogation, by networks of corruption.<sup>129</sup>

After the Fujimori administration's violations, García began its second period in 2006. The supposition was that Garcia was going to harness any opportunity for compliance to show respect for HR and to stop anticorruption issues. Contrarily, it is put to question whether Garcia wanted to confront entrenched impunity since he relegated HR by economic development.<sup>130</sup> There has been, indeed, a slight decline in Peru's compliance since 2005. The Garcia government's nationalist discourse sought popular support for the State's refusal to comply with the "scandalous" judgment in the Castro-Castro (Peru) case.<sup>131</sup> Since the symbolic reparation ordered by the Court affected the interests of high-ranking militaries and their agents, individuals in the police force, intelligence agencies, or other hierarchical armed institutions, García required its

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<sup>127</sup> U.S. Department of State. 2003. Country Report on HR Practices. Bureau of Democracy, HR, and Labor. February 25, 2004. <http://www.state.gov/g/drl/rls/hrrpt/2003/27916.htm>. (April 28, 2009)

<sup>128</sup> Inter-American Commission on HR. 1998. "Country Report: Peru." [www.cidh.oas.org](http://www.cidh.oas.org). (July 17, 2007).

<sup>129</sup> United States Department of State. 1999. Country Report on HR Practices. Bureau of Democracy, HR, and Labor. February 23, 2000. [www.state.gov](http://www.state.gov). The U.S. policies of partnership in the drug war become a priority over human rights not only in Peru but also in Guatemala. Council on Hemispheric Affairs. 2006. "Guatemala's Cursed Armed Forces: Washington's Old Friend is Back in Town." <http://www.coha.org>. (April 28, 2008).

<sup>130</sup> Wright-Smith, The decision to comply: Patterns of compliance with the Inter-American Court of Human Rights 103. 2011.

<sup>131</sup> Cavallaro & Brewer, AMERICAN JOURNAL OF INTERNATIONAL LAW, 824-5 (2008). (The Court's order was criticized as being an offense to the memory of the victims of terrorism since the order would have included the names of people who were presumed, by the media, to be terrorists. See Mario Vargas Llosa, El ojo que llora, EL PAIS, Jan. 14, 2007, available at <<http://www.elpais.com/articulo/opinion/ojoillora/elpepioni/20070114elpepiopi.5/Tes>>[Spanish (International Sort)] Also, in an article attacking the judgment, the national newspaper, Correo, reported finding two names of those involved already inscribed on the monument. The discovery prompted the mayor to vow to remove all the names of "subversives" from the monument. [Spanish (International Sort)] Terroristas en "El ojo que llora", CORREO, Jan. 11, 2007, available at <[http://www.correoperu.com.pe/lima\\_notas.php?Id=40746](http://www.correoperu.com.pe/lima_notas.php?Id=40746)>.)

replacement. The Court revoked its order<sup>132</sup> seeking “[...]o overcome the difficulty reported by Peru [related to a monument called the Eye that Cries] in its brief of February 29, 2008.<sup>133</sup> However, this Court’s backing off was ineffective because the Castro-Castro case remains in noncompliance as a result that Garcia never started to comply with orders to investigate and prosecute those AUTHORITIES responsible for HR abuses, including Fujimori.

These experiences show that under State pressures, the Court can change its decisions. Maybe the Court knows that its judgments may challenge elected leaders or presidential agendas,<sup>134</sup> and, in consequence, providing a variation in compliance would be acceptable. Perhaps, the Court trusts that its decisional changes<sup>135</sup> raise cooperation<sup>136</sup> and counteract perceptions that judges are not faithful to the State preferences expressed in a treaty or customary international law. To make the requested change or “backing off” in its decisions, the Court assesses the expected outcomes regarding those States that do not have a reputational concern. Indeed, the Court should assume that powerful States (Brazil), those with the support of powerful States (Peru), and those that are rogue or show a particular conflict with the Court (Venezuela), do not need validation to improve their reputation. The Court makes apparently its decisions consistent with its knowledge. In this way, when the Court changes its decisions, the Court attempts to encourage

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<sup>132</sup> Miguel Castro Castro Prison v Perú (Mertis, Reparations and Cost) ICHR, 25 November 2006. Ser. C No. 160, para.3

<sup>133</sup> Castro Castro v. Perú (Interpretation) ICHR, 2 August 2008. Ser. C No. 181, para. 57.

<sup>134</sup> Abram Chayes & Antonia Handler Chayes, *On compliance*, 47 INTERNATIONAL ORGANIZATION, 197 (1993).

<sup>135</sup> Alexei Trochev, *The Role of the Constitutional Court in Russian Politics, 1990–2006* 23 (Cambridge: Cambridge University Press 2008). See for example Miguel Castro Castro Prison, *supra* 130, para. 3

<sup>136</sup> Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights* 328. 2013.

serious and long-term HR commitments<sup>137</sup> amidst States in which the Court has a problem to permeate in reputational terms.

## **B. Acquiescence, AUTHORITIES and high compliance**

An indication that this interpretation is on the right track is that most exceptions to the relationship between acquiescence and lower compliance i.e. cases with acquiescence, AUTHORITIES but with compliance – can be explained by change in AUTHORITIES, type of victims affected by AUTHORITIES.<sup>138</sup> In addition, in these three cases: Trujillo Orozco (Bolivia), Servellon Garcia (Honduras) and Tiu Tojin (Guatemala), an early monitoring of the Court was joined to a particular State position.

<sup>139</sup>

In the Trujillo Orozco (Bolivia) case, the State expresses acknowledgement of the detention, torture and forced disappearance of the José Carlos Trujillo Orozco by military agents and for the failure to investigate those responsible. And even with AUTHORITIES such as Colonel Rafael Loayza, Head of Intelligence of the Ministry of the Interior, Antonio Guillermo Elío, Deputy Secretary, and the Ministry of the Interior that hide the crimes and ensure the impunity of the authors,<sup>140</sup> the return to democracy seems to have a direct effect on the high compliance of this case since Bolivia decides to leave without protection the AUTHORITIES of Banzer's dictatorship, as the following

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<sup>137</sup> Cavallaro & Brewer, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, 826 (2008). Hawkins & Jacoby, *J. INT'L L & INT'L REL.*, (2010).

<sup>138</sup> The discussed pattern is ultimately corroborated by cases that do not involve AUTHORITIES in which the early acquiescence and high compliance are presented. Seems to indicate that acquiescence is sincere, because they do it when then do not have objected and compliance is higher (from 60 to 80%). Cases such as Kimel and Vargas Areco reveals such tendency

<sup>139</sup> Regarding the Honduras and Guatemala compliance, see details in the work of Kali Wright-Smith, *The decision to comply: Patterns of compliance with the Inter-American Court of Human Rights* (2011) PURDUE UNIVERSITY).

<sup>140</sup> Trujillo Orozco, *supra* 63 paras. 2, 13, 36-43

statement stresses “Fell two former officials of the dictatorship of Banzer.”<sup>141</sup> This case registers a rate of compliance of 71% of compliance.

Publicity increased the State propensity to comply, especially when the State is unequivocally responsible for the abuse and its victims were children or well-known persons. This element can explain why the rate of compliance of Servellon Garcia (Honduras) and Tiu Tojin (Guatemala) cases is high, despite them having AUTHORITIES to protect. These cases have a rate of compliance of 65%.

The Servellon Garcia case is the first international case of children’s HR. The Court determines that Honduras was liable for the illegal detention, torture, and extrajudicial execution of one adult and three children. The State conceded its responsibility for the operation carried out by the Public Security Force in a context of violence marked by the victimization of children and youngsters in a situation of social risk, in which more than 24 AUTHORITIES were implicated.<sup>142</sup> The State complied quickly with orders to initiate HR training for the police, create a database to facilitate investigations of missing youth, and publically honor victims. It was highly cooperative in this case, and the victims’ representatives “acknowledged the good will expressed by the State.”<sup>143</sup>

From the mid-1990s, Honduras has started to comply at a rate of 50-60%. Honduras’s discourse reveals a commitment to comply within its acquiescence of responsibility; nonetheless, the State frequently complies to send a signal to international organizations. This signal improves its reputation and appeases claims by an absence of

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<sup>141</sup> Trujillo v. Bolivia (Monitoring) ICHR, 17 November 2004.

<sup>142</sup> Servellón García v. Honduras (Reparations and Costs) ICHR, 21 September 2006. Ser. C No. 152, para. 79

<sup>143</sup> Id., para. 58



an extensive HR reform. Commitment to compliance from Honduras is largely hindered by its sovereigntist discourse to avoid the interference of the Court.<sup>144</sup>

In Tiu Tojín (Guatemala) case, the State acquiesced for the forced disappearance of María Tiu Tojín and her daughter Josefa Tiu Tojin and the subsequent denial of justice. This case is another illustration of high compliance despite implication of AUTHORITIES. AUTHORITIES are implicated (as the Court established) as part of a pattern of massive and systematic violations of HR ordered by the State. This pattern is committed during the internal armed conflict and carried out by military agents and members of the Civil Self-Defense Patrols in detriment of the Mayan indigenous people and the communities of populations in resistance.<sup>145</sup>

Guatemala's discursive focus on recent administrations' prioritization of HR and remediation for past abuse is an essential part of its acquiescence.<sup>146</sup> Commitment to compliance is a recurrent argument of its acquiescence. Its arguments are presented along with a high number of anticipatory remedial obligations that coincides with its shift toward greater compliance (at a rate of 40-50%) after 2004.<sup>147</sup> Nevertheless, the normative commitment does not reach the full implementation due to impunity,

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<sup>144</sup> Honduras made severe critics against the Court, declaring that its processes lack ground and truth (as the Case of Godínez-Cruz v. Honduras (Objections) ICHR, 26 June 1987, Ser. C No. 3, para. 28); that its judgments are unreasonable since the Court also has prejudice against Honduras (as the Case of Juan Humberto Sánchez v. Honduras (Interpretation) 25 November 2003, Ser. C No. 102, para. 19a and 34d); that compliance depends on Honduras policy “framework” exclusively (as Servellón-García, supra 7, para. 68). In the same vein that in López-Álvarez, Juan Humberto Sánchez, and Servellón-García cases, Honduras claims the Court cannot demand action that falls outside of its regular domestic procedures.

<sup>145</sup> Tiu Tojín, supra 2, paras. 2, 53.

<sup>146</sup> Supra 179

<sup>147</sup> Blake, supra 1; Bámaca, 2; Myrna Mack, supra 2; The Plan Sanchez Massacre, supra 2; Molina-Theissen, supra 2; Carpio Nicolle, supra 2; Tiu Tojín, supra 2; Dos Erres Massacre, supra 2; Chitay Nech, supra 2.

centralization and its weak institutions prevent that the norm of compliance be evenly accepted and distributed throughout the government.

Honduras and Guatemala are in Central America, regarding their compliance could be missing as a consequence of the domestic instability, institutional weakness, and economic damage that characterized the Central America, but compliance has the opportunity to increase slowly. Each State's discourse includes (most of the time) commitments rather than justifications of abuses, their discourse apparently matches with a commitment to comply with HR. Guatemala and Honduras through their acquiescence have showed themselves as legitimate (as they are interests of States in Stage 1) and democratic States that recognize that they are unable to neglect norms of justice and accountability. Nevertheless, unfortunately, there are not entirely collective ideas of appropriateness and varied responses to HR obligations, domestic failures, and a weak rule of law, show that the rules are not fully internalized. These values are not intrinsic parts of their identities, and therefore, full compliance will be difficult to emerge until all domestic institutions uphold these norms.

### **C. Non-acquiescence, AUTHORITIES and little compliance**

Another indication that the presented interpretation on the protection of AUTHORITIES is right is the lower rate of compliance of cases without acquiescence. This phenomenon is also explainable by the presence of high-ranking officials. In fact, the rate it started at 50% and then fell to 37%. As it was explained in Chapter 3, Stage 1, acquiescing is useless when there is *not* proof of alleged actions or omissions against AUTHORITIES or institutions of the State. Two cases, Serrano Sisters and the Garcia

Prieto (Salvador) illustrated that this results when there is a law obstacle to using or the evidence is nonexistent or only for people in their condition of individuals. There is no additional risk for high AUTHORITIES since States could also anticipate that the actions will be targeted against the scapegoats only.

In fact, both cases were shelved by prescription on May 27, 1998, and on June 9, 2004, respectively.<sup>148</sup> In addition, in the Serrano case, there is no evidence of the abduction of the victims since the State affirmed that the kidnapping and their fate were not established. In the same sense, the Supreme Court decided it was inappropriate to investigate the whereabouts of victims by members of the no longer existing battalion owing to the Peace Agreements. The Ministry of Defense did not provide information about the battalion and stated that Captain Jiménez and Officer Ticas are no longer enrolled in the institution, making it impossible to find them and accuse the battalion members.<sup>149</sup> In the Garcia Prieto case, Salvador alleged that private individuals that were found guilty committed Garcia's homicide. The State rejected that a member of the Division of Criminal Investigation was the third material perpetrator and a General the intellectual author; indeed, their charges were dismissed for lack of evidence.<sup>150</sup>

The illustrations (narratives that capture the qualitative analysis) presented above indicate that the presence of AUTHORITIES in this study was a factor of control in all the emerging patterns – notably since they relate to the interaction between the States and the Court. This Chapter also noted that AUTHORITIES applies to other contexts.

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<sup>148</sup> Serrano v. El Salvador. Merits, Reparations and Costs. Judgment of March 1, 2005. Series C No. 120, para. 48 (25); García v. El Salvador (Objections, Merits, Reparations and Costs) ICHR, 20 November 2007, para. 91

<sup>149</sup> Id., para. 48

<sup>150</sup> Id., paras. 72, 75 and 88

***Summary.*** While in Chapter 3, mixed qualitative/quantitative data revealed patterns of the interaction between States and the Court to inform the analysis, the picture of this examination is completed with illustrations of qualitative data in this Chapter. A more detailed summary and a discussion of the results are presented in the next Chapter.

## **CHAPTER FIVE:**

### **SUMMARYING AND DISCUSSING THE RESULTS**

#### **I. SUMMARY**

The reality of the Inter-American Court of Human Rights (ICHR) is that States fully comply with only 5% of its judgments. I argued that noncompliance is understandable by the interaction between States and the Court. This dissertation analyzed patterns of noncompliance resulting from this interaction in both the judicial proceedings and monitoring processes. The existing theoretical ideas, however, do not allow us to perceive patterns arising from this systematic interaction for three reasons.

(1) The scholarly tend to be concerned with *compliance* with norms most of the time, not judgments, and these show different patterns: mostly compliance with norms mostly noncompliance with judgments. Moreover, each main IR theory (realism, institutionalism, liberalism, and constructivism) can explain only some portions of noncompliance, leaving gaps in our understandings about compliance and noncompliance. (2) Furthermore, the States' and Court's roles have not received the same systematic scholarly attention. Or, put plainly, these leading IR theories do not systematically consider *the Court's participation* (at least, to some degree) on the formation of States' preferences nor its impact in judgment compliance. However, courts participation in IR processes does not necessarily mean that courts or their ideas determine the nature of the interaction by itself or in isolation. Participation is not the same as the capability to produce specific outcomes such as compliance. (3) These IR theories seem to provide theoretical importance to *the process of interaction* between

States and Courts. However, they do not account that the very process of interaction itself is fit to explain the problem of compliance.

As a result of these three reasons, those theoretical ideas do not try to account for the phenomenon of interest in the direction that this dissertation explored. Indeed, none of the existing approaches explains how the exercise of the interaction between states and courts may affect the structure and dynamic of compliance and noncompliance, including the role that ideas might play. By this major flaw in IR theories, it is required a theory of compliance with judgments that guides the understanding of how the problem of compliance happens.

This is why the research concern established in Chapter 1 placed the question: *How do States move toward or away from compliance in their interaction with the Court and its judgments?* It was answered by the identification of the process of interaction that allows the generation of a processual theory. This theory is grounded in the interaction, and it can place together the **problem** of compliance developed between two specific **actors**: states and the ICHR in certain **processes** and around **principles**. These four combine with the current **goals** of states and the court. In this theory, those counterintuitive effects about the interaction between States and the Courts are revealed. This theory contributes to the extension of prevailing ideas about compliance and noncompliance.

The reasons and motivation for examining the role, the type, the scope and impact of the interaction between states and the courts are, as pointed out in Chapter 1, because this interaction is the missing key to explaining complex and unexpected relationships between patterns of behaviors that result from the Court and States' routine or strategic

responses. The interaction that was addressed by this dissertation is an unexplored and understudied field. As explained in Chapter 2, this study provides new insights into the interaction between States and the Court through the method of Grounded Theory. This approach means that conclusions have been drawn from the ground up, in this instance from depictions of States members of the Inter-American HR System and the ICHR, who currently appear as parties in 129 cases started by the violation of HR. This study was highly exploratory and, aided by NVIVO analytical software, resulted in many potential findings and patterns of interaction and noncompliance that would be valid topics for further study.

From initial empirical observations of the *problem* of compliance, first, emerges an unexpected preliminary finding: acquiescence leads to lower compliance rates in which both nature and structure of the interaction between states and the court is identified.

Second, the nature of the relationship between acquiescence and compliance was found to be determined by **two partially incompatible State and Court goals** for the resolution of a case (protecting versus prosecuting high-ranking authorities). Compliance and noncompliance decisions and all factors identified in the relationship between acquiescence and compliance are influenced by the goals of States and Courts in confined contexts. Thus, they are context-dependent goals, in which; if the context preserves its status quo, the goals keep their force. On the contrary, if the context is changed, the goals also (at least, eventually).

As pointed out in Chapter 3, I propose that we can understand the relationship between acquiescence and compliance by analyzing acquiescence as the first step in a

series of different actions designed to minimize the consequences for high-ranking authorities of being prosecuted by an ICHR judgment. These State actions do not continuously work, as the ICHR for fear it would betray its idealistic goal insists on obtaining domestic prosecutions that require actions against high-ranking authorities. In such instances, States, given their goals of protecting high-ranking authorities, either fail to comply or enter long enforcement monitoring processes.

Third, the nature of the relationship between acquiescence and compliance was found to be determined by State's material goals that interact with the Court's normative goals in certain processes. The analysis that defines *processes* is, thus, consistent with the observation that without a progressive idea of change is impossible to predict state behaviors about compliance and noncompliance. Indeed, the central hurdle with the extant compliance ideas centers on their static, rather than dynamic approach about change. In these static approaches, the potential change is recognized at a different level from that it works. In the process revealed by the data, this determination of change was crucial to understand the effects of each factor within its own particular context. That it is said because under the argument developed here, States and Courts affect compliance and noncompliance in predictable ways. For example, it would predict a general occurrence such as how ruling and compliance can arise from alternative modes of engagement and negotiation. Or, more specific issues as that compliance is strongest where States propose anticipatory remedial actions and these remedies link between cooperation and procedural progress – even if State interests point in the opposite direction. However, compliance will weaken when the Court diminishes the monitoring process.



Alternatively, it is possible to predict how ruling and compliance can arise from alternative modes of engagement and negotiation.

There are five sub-*processes*, namely stages. These sub-processes are descriptive and conceptual categories: signaling, exchanging, negotiation, monitoring, and sanction. It was traced the sequence of events (action/reaction/counteraction) to show how sub-processes build on each other. Since each sub-processes combine problems that move States toward or away from compliance, it is logical to distinguish factors that are contributing to compliance from those that are contributing to noncompliance.

The sub-processes by which compliance and noncompliance are produced can affect the way in which States form their preferences and interests. In that sense, the analyzed data challenges our preconceived notions about how to understand compliance. As it was mentioned in Chapter 3, compliance is not an all-or-nothing case; rather, it results from a story that unpacks contributions from States and Courts. Thus, even when the data seems to suggest that the judgment compliance can be conceptualized as a form dominated by calculations of political interest and power, compliance is not an issue to be resolved just by a treatment of objective information (in isolation) since the interaction serves to form subjective experiences that States and Courts can develop as a part of their propositional language. In the process in which compliance is developed, practical realities/considerations (of the process) join the State instrumental calculations with normative concerns of the Courts. Thus, it is the interaction between the two that brings an added element to the equation.

The Courts would affect, in certain ways, State preferences, because they place their judgments in a process of interaction that are more than a series of standardized

operations to change or preserve pre-determined preferences or goals. Rather, they are process in which compliance with the Court judgments is an inherent component of a language guided by the directly participation of the Courts. In fact, during the decision-making processes (such as judicial proceedings and monitoring) the Courts consider how actions and their intentions are expressed to interpret how these communicated actions fit with norms to rule. The results of this dissertation illustrate how the Courts judged the petitions for acquiescence together with the rationales and justifications for State actions. Then, all these understandings were critical to determining compliance. **Because the Courts have the power to interpret State behavior and stabilize their normative meanings, the Courts contribute to the creation of a process of interaction and for change in which the Courts enhance or diminish expectations of States. In this way, the activities of the Courts interplay a role in a broader identified process.**

In the processual theory that the data reveal, the ability of the courts to affect IR is expressed in that the courts can also create opportunities for states to act in traditional ways (e.g., by protecting their material power and rejecting compliance). It does so by reducing the State's sovereign power through providing legal, symbolic resources that translate into the power to name violations and violators in particular *intrusive* law remedies. This way of interaction displays an alteration in the distribution of power between States and Courts during the proceedings and monitoring that opens space for Courts to participate in a broader process. Nevertheless, political factors such as the presence of high-ranking authorities implicated in international HR processes and the tensions between powers often limit the Court and its nuanced, complex interaction with the State. Also, a persistent obstacle to the Court is the asymmetries of power between

States and the Courts. These asymmetries came from the ability to make (or not) decisions appropriate to their goals - based on their anticipated knowledge. States make, for instance, calculations based on it.

My empirical research has revealed patterns that can be analyzed to fill out the gaps of the current governance theory. What is most impressive about the results, are that they put in evidence that the reality of compliance problem does not always work the way the governance theory (IR) says the reality does or should be. The central conclusion is that rational approaches (e.g., realism and institutionalism) have little to say about how the Courts (one of the two actors within series of interactions) participate in noncompliance. Liberalism considers the interests of non-state actors, and states filter them. However, liberals do not indicate how the preferences of non-state actors connect with international institutions (such as Courts) in the interaction to form state preferences. Constructivism explains compliance and noncompliance equally, failing to explain a normative direction i.e., how the social construction of some ideas (principles around the interaction between states, non-state actor and international organizations) move towards compliance or noncompliance. These theories also seem insufficient to explain the potential change of state and court interests and ideas during the process of interaction; thus, the idea of change is not considered in all its dimensions that it is an impediment to the predictability of each theory.

All in all, there is no evidence in the data that contradicts that political factors to avoid compliance can also impede to the Court leverage the nature of the relationship and aspects of its frequent interaction with States to remove some of the unprogressive HR situation. These actions can be tested against empirical evidence from international

judicial proceedings and monitoring processes. They can be further explored because I have specified the mechanism, by which interaction works, the conditions in which the process occurs and the interaction translates into State interests. It brings to the normative conclusion that to change an unprogressive HR situation it is both appropriate and necessary for Courts be convinced that States can change their behavior in light of its interaction. To do so, the Court needs to crystallize its goals toward interconnections that relegate the idealism by a discourse that needs to be also progressist, pragmatic and even strategic. In this context, there is a need to implement behavioral changes. Thus, it is the moment to hypothetically ask: *How can Courts leverage their interaction with States in ways to increase compliance?*

I sought to analyze these emerging patterns to offer an explanation of noncompliance with international judgments to engage scholars and policy makers in a fresh discourse that is more grounded in actual practice than historical compliance debates have been. The practical considerations that are ensured by emerging patterns should be the basis for empirically-based judgment compliance theory, whose process and mechanism has been defined. I also pointed to issues that must be resolved anew as a result of my findings through sound statutory and political reform recommendations. Focusing on interaction, I propose a package of five strategies in the Court actions to address the problems my analysis identified such as introducing a state report or progress of the status of the violation; naming responsibility for the abuse and persecutor; engaging conditional agreements; procuring equal treatment, timely compliance and understandings and mapping Court reactions. Such matters include the actual impact of

international HR judgments, which are, in part, meant to act as deterrents to future HR violations.

## **II. THEORETICAL AND POLICY IMPLICATIONS**

### **A. Theoretical implications**

From the results presented and analysis described in Chapter 3, I have identified patterns of noncompliance that relate back to the explanations that the IR theories offer to the extensive noncompliance with ICHR judgments summarized in Chapter 1. First, the central finding of the analysis supported by the data suggests how many states in the ICHR system have found ways to subordinate the ICHR to their political interests. My data indicate that, in cases involving high-ranking political authorities, states parties evade compliance with the court's judgments. Thus, the court does not play a stronger role in restricting sovereign state power—that is the theoretical explanation for why states parties have moved in the opposite direction in weakening the court through deliberately frustrating compliance. I also have described how the noncompliance includes an interaction between states and the court, namely, power and political interests of domestic political actors and the idealist Court's participation in state strategies.

Second, the empirical evidence does not support that one theory explains most of the noncompliance the ICHR system experiences. Thus, noncompliance fits into different IR theoretical explanations: (1) the domestic political actors that have found ways (a strategy) to sustain noncompliance resonates with liberalism because liberalism focuses on domestic factors as the key variable for explaining IR. (2) The power and political interest of States to avoid compliance seems to fit with rationalist theories of IR, such as

realism or institutionalism (e.g., the states fail to comply because the states determine it is not in their interests to comply with judgments (or, the costs of compliance outweigh the benefits of complying). (3) The Court's participation in state strategies seems to connect to either an institutionalist or constructivist explanation in IR (e.g., from an institutionalist perspective, the Court is a regime (composed of substantive rules and procedural mechanisms) or institution that can help through better cooperation and compliance with mutually agreed rules; from a constructivist perspective, the Court helps create a process of social construction of ideas about HR and compliance with the ICHR).

*Starting with Realism*, realists believe they can explain the extensive noncompliance observed in the ICHR system by showing that compliance with HR brings no benefits to states regarding their material power, position, and prospects. Ultimately, realism would demonstrate how unimportant HR rules are to the struggle for power that dominates the IR. Put more plainly; realism does not need to develop much interest nor take HR seriously. Thus, realists have three expectations. First, there will be no case, under realism, in which a state did not comply because an HR international judgment's intrusiveness, scale, or substantive conclusions that have threatened state's material power. Second, rates of compliance to track whether compliance provides benefits to the state regarding its material power. Third, the realist explanation focuses on States as the single rational actor that matters in compliance. Thus, the Courts are not and will not be ineffective (in the realism) since States will not react to restraints neither possibilities given by them. These three expectations can be erroneous:

(1) Under this view, international institutions like the Courts cannot change the structure of the IR, and they reflect state calculations of self-interest; as a result,

institutional outcomes reveal the balance of power. However, the courts do not reflect state calculations of self-interest based when they are HR Courts that threaten State material power. The data show, quite clearly, that, compliance with HR might hurt the effectiveness of key institutions of the state in material power terms. Even more specifically, the military and intelligence agencies are part of these key institutions that I call, during my analysis, AUTHORITIES. There is noncompliance because these AUTHORITIES trigger opposition of states. Realists overlook, thus, that compliance with international HR judgments can threaten a State's material power vis-à-vis other States.

(2) The data demonstrate that compliance with HR judgments holds no material benefit - when states view the ICHR as a threat to sovereign and a representation of hegemonic interest. Thus, under the territorial sovereignty and non-intervention principles, the State urges the Court to back off: through noncompliance and self-marginalization from the Court's jurisdiction, the treaty regime and finally, the system. These cases provide an excellent example of the theoretical failing in the realist logic.

(3) The Courts can be effective since States interacts with Courts in terms of restraints and possibilities given by them. Realist outcomes reveal contradictory logics, on the one hand, realists consider that the Court cannot move States toward compliance, thus, under this logic the Court neither might move States away from compliance. The data reveal, quite explicitly, that, in certain cases (e.g., judicial obligations of acquiescence cases), the court (and the ICHR regime overall) does not change the behavior of states. However, this happens not only since states parties have deliberately frustrated compliance across time and found ways to protect their political interests and

power. But also, the analyzed data suggest that the ICHR's participation in State strategies produces noncompliance. In fact, the ICHR's issuance of judicial obligations and directed against certain people has filled (but also could challenge) the State motivations. In other words, the court provides incentive or disincentive to states compliance. On the other hand, the realism explains the court's lack of material power by treating the courts as states, when with or without material power the Court's judgments can affect States' material power (as it was said above) and the courts and their systems do not instate for global government. ICHR installs, for example, its processes to serve in cooperation and coordination States' efforts to achieve implementation of norms and judgments - respecting sovereign and non-intervention principles - and do not seek to intervene internal affairs.

*Institutionalism* completes some of the gaps in the realism, even when, similarly, like Realism, accepts that States are unitary rational actors. However, the assertion that distinguishes institutionalism from realism is that institutionalists claim that, in certain situations, institutions can have an independent effect on state behavior. The court is an institution, a regime composed of substantive rules and procedural mechanisms. It is feasible that institutionalists concentrate on the attributes that the courts have as an active center; for example, the ICHR does move States toward compliance in non-judicial obligations via cooperation. Institutionalism recognizes that institutions do not always have this impact on the rational calculations of states.

The analyzed data show, quite clearly, that, in certain cases, the court (and the ICHR regime overall) does not have much impact on the rational behavior of states across time because states continue to find ways to avoid compliance. Just as



institutionalism explains, in other contexts, why institutions do not have a substantial impact on state behavior, institutionalism, as a theory, can consider for the phenomenon of interest to this dissertation. Now, again, the explanation might not be sufficient or persuasive based on the data. Indeed, the data makes institutionalism insufficient or unpersuasive since my data provide powerful evidence that the court does not, in fact, have this “independent role” institutionalists claim theoretical analysis must explain i.e., do not support the notion that the court has some power over states that institutionalism fails to take into consideration.

Institutionalists generalize that institutions create incentives for cooperation and assumes institutions able to disincentive States to leave the international community. Rather, Institutionalism might explain, before placing the success of institutions, how the nuanced calculation of states (can be based on fears about relative power) when a complex interaction is placed by the court's issuance of judgments. For example, Institutionalism cannot explain why, despite high levels of cooperation, noncompliance persists.<sup>1</sup> Four States<sup>2</sup> have been repeatedly internationally responsible. This chronic and disproportionate noncompliance by Peru, Guatemala, Colombia and Venezuela is more than a follow-up issue.<sup>3</sup> The theory fails to explain more serious, complex cases of noncompliance such as these aforementioned, those illustrated by the States that self-marginalized from the Inter-American HR System or those in which noncompliance is mixed with or rooted in costly reparations. Courts like the ICHR have pioneered a range of remedies for HR violations that accept the possibility that costlier solutions “could be

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<sup>1</sup> Case of Baena-Ricardo et al. v. Panama. Competence, Inter-Am. Ct. H.R. (ser. C) No 104, (November 28, 2003), for which 166 observations involving 3 IL institutions were issued in 10 monitoring orders.

<sup>2</sup> Representing 66% of cases in the monitoring process as of 2010

<sup>3</sup> Peru's noncompliance (27%) is much more than a follow-up issue.

an obstacle to compliance.”<sup>4</sup> Domestic factors can also hinder compliance if the Court’s reparations rely on non-existent, and therefore inapplicable, domestic law. When noncompliance is the result of multiple actors that interact Institutionalism is best complemented with a pluralist IR explanation, as in Liberalism and Constructivism discussed below.

*Liberal theory* seems to be a persuasive theoretical explanation of the data generated in cases involving high-level political authorities within states parties in the ICHR system. This theory argues that political actors and processes within the state shape the state’s international behavior and national interests. According to the data, AUTHORITIES are these domestic political actors that have repeatedly found ways to sustain noncompliance with international HR obligations over years and years.

In consequence, under this view, “State decisions in the international realm [require] understanding the domestic politics that underlie them.”<sup>5</sup> To illustrate, in the Case of Hilaire, Constantine, and Benjamin et al. v. Trinidad and Tobago – we see that despite Trinidad and Tobago’s reservations regarding the application of capital punishment upon ratification of the American Convention, the ICHR judgment ordered the State to abstain from executions. Trinidad and Tobago contested the order citing a domestic legal process that prevented compliance with some reparations ordered in this case. The judgment was inconsistent with the State’s juridical system by specifying the cessation of capital punishment instead of the discretionary power of pardon available in the offending State’s legal system. These ICHR’s attempts to effect positive change in domestic law made it foreseeable that the judgment would be met with noncompliance.

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<sup>4</sup> Hawkins & Jacoby, J. INT’L L & INT’L REL., (2010).

<sup>5</sup> Hathaway, THE YALE LAW JOURNAL, 1953 (2002).

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Liberalism would acknowledge that the interests of Trinidad and Tobago, one of the three Commonwealth Caribbean States, emerged from the bottom up (through domestic legal processes) against the ICHR’s attempts to abolish capital punishment. Thus, in the absence of means to support norms, rules, and judgments, IL has a minimal chance of connecting domestic and international institutions and of promoting

compliance.<sup>6</sup> Therefore, international courts do not make a long-term global policy form as liberals supposed to do. The data clearly demonstrates how little the court's "power" matters in the cases I identify—cases that liberal theory can, in fact, explain in that the Court's role is illusory until become a preference of non-state actors.

A flaw in liberalism is that the extensive noncompliance begs the question why all the norms, rules and judgments of the existing Inter-American HR system have not been enforceable by non-state actors in connection with member states. Liberalists' focus on domestic interest formation but does not provide an in-depth explanation of how a non-state actor's perception of its interests could come or be altered by State participation in international institutions.

For instance, in the Trinidad and Tobago case, the question is how those non-state actors behind the interests of Trinidad and Tobago would interact with the ICHR's jurisdictional overreach to produce noncompliance. Liberal theorists do not provide an explanation about how States filters the domestic preferences of non-state actors in IR. For example, it does not explain how Barbados made explicit the capital punishment as an affair unquestionable by the Court since as a rule reflects the decision of its people. Therefore, liberal theory explains that the process of compliance and noncompliance results from an interaction between the Courts, States, and non-state actors but without detailing how. Thus, when noncompliance is the product of multiple and complex interactions Institutionalism is best complemented with Constructivism discussed below.

Finally, *Constructivism* argues that IR is explained by looking at the social construction of ideas that occurs through the interactions of state and non-state actors.

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<sup>6</sup> Helfer, COLUMBIA LAW REVIEW, 1859 (2002). According to Helfer, linkages that could act to improve compliance can instead cause a possible counter-reaction.

The presented data show that the idea of full compliance with ICHR judgments is not an idea socially constructed in the set of ideas and interactions under the ICHR system. Rather, state actors have strategically, and in a pattern of behavior, the data reflect, pursued noncompliance. My analysis, in fact, shows how this theory ignored that the international system could force states to be egoists and sovereign-actors, indeed, states have managed to construct socially noncompliance in the kinds of cases that demonstrate this pattern of behavior—and have done so while socially interacting with the ICHR institutions and non-state actors around political interests.

Constructivism focuses on the process of change, thus, this theory assumes that states change by intersubjective understandings and expectations of being mutually conditioned parts of a larger whole (community norms).<sup>7</sup> There are questions about the value of constructivism as a theory. For constructivists the outcomes are unimportant, accordingly, constructivism focuses on the process of change rather than on its ends and cannot predict the future of international politics like compliance.<sup>8</sup> Thus, it does not answer how this process of social construction of ideas (constructivism) produced such high levels of noncompliance? This theory merely explains to us that ideas about compliance and noncompliance, like all significant aspects of IR, are equally social and historical constructed.<sup>9</sup>

In this sense, under constructivism, what is happening between member states of the Inter-American System is that the Court and its monitoring process (an institution that facilitates a process of social construction of ideas about HR and compliance with the ICHR) has failed to socially construct compliance-friendly ideas with ICHR judgments

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<sup>7</sup> Mearsheimer, *INTERNATIONAL SECURITY*, 140-2 (1994).

<sup>8</sup> *Id.* at, 132-3.

<sup>9</sup> *Id.* at, 132-3.

and attitudes in the set of interactions under the ICHR system that affected communities (national or regional). However, and despite constructivism considers the potential change and interaction of state interests and courts, as theory seems insufficient because constructivism cannot answer why some processes to create noncompliance become dominant in the set of ideas? Constructivism, as a theory, does not point in any particular normative direction. In other words, constructivism cannot explain which are ideas are better than others because we need some other theory to explain why the “more compliance” idea is better than some other idea.

It is hard to see how one theoretical explanation covers the many complex cases I have categorized from the ICHR system. In the present analyzes, all IR theories are united to explain a different portion of the data. The unification makes evident that a comprehensive theory of judgment-compliance is needed. However, the unification is a risky operation since it implies to harmonize too much notion, as I said in Chapter 2. My data and analyzes show how each theory has a problem in its causal logic since they do not allow us to perceive the profound interaction between the States and Courts. The analysis makes understandable the role of the interaction between States and the Court in the problem of compliance. My data contribute to extending the understanding of IR theories.

It was also hard to decide which of the many possible changes would be the adequate to overcome the problem of compliance when the evidence shows only a 5% full compliance rate with court judgments more than three decades after this regime was established. Context in which, the ICHR is well known as ‘the clearest example of a Court where noncompliance is the norm,’ as it was mentioned in Chapter 3. The data

allow me to conclude that the court system needs to move in (at least) three levels – changes at the State level, inter-State level, and the intergovernmental level. However, the data strongly raise the question why the court (and its attendant institutional pieces) has such a weak role in this HR system and why the Court is so routinely, over many years, manipulated and subordinated by states. Thus, the efforts in changes need to be preliminarily placed in the Court. Moreover, the data seem able to support a theoretical explanation about how or why the court has a role that it can leverage in these sets of interactions. More broadly, the data reveal the ability of the court to participate in IR processes that create opportunities for states to act in certain ways - it does not necessarily mean that the tribunals or their ideas determine the nature of the interaction by itself. As I said above, participation is not the same as the capability to produce specific outcomes, but it is possible to initiate them.

Based on the evidence five changes regarding the Court practices are presented. These changes are possible responses anchored on what problems the proposals were specifically intended to ameliorate, even when Institutionalism and Constructivism serve as theoretical supports to shifts in the court practices. It is interesting how those theories have different explanations for why a better Court practices are one of the keys to improving compliance. These changes are based on the premise that whether the Court changes the context in which the preferences of States are formed, the State rational calculations during the proceedings and monitoring processes can be altered favoring compliance (institutionalism), or at least an idea of change toward compliance could be constructed (constructivism). However, if the Court practices are the problem with existing noncompliance, how do we explain how this institutional process

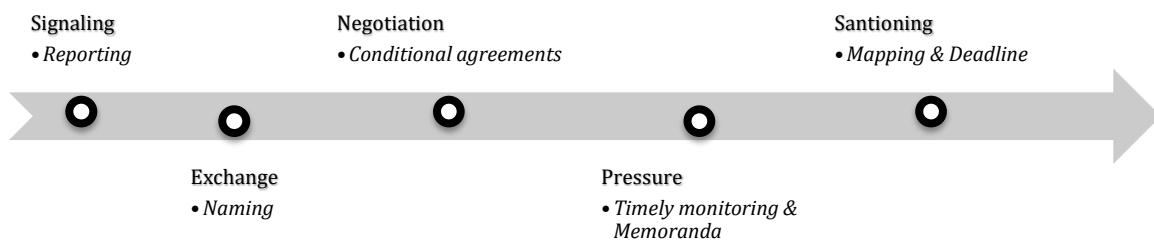
(institutionalism) or this process of social construction of ideas (constructivism) produced such high levels of non-compliance? It appears (theoretically) that the evidence suggests that the Court has not sufficiently (1) shaped state interests (meaning institutionalism is in trouble here), or (2) socially constructed compliance-friendly ideas and attitudes in the communities affected (meaning we have questions about the value of constructivism as a theory). Further, constructivism cannot support moving the social construction of ideas towards compliance because there is no idea in which “more compliance” idea is better than some other idea. Thus, let's improve the Court (as a normative argument) does not seem to answer the deeper problems the combination of the evidence and IR theory identify. The existing data are, however, insufficient to respond to these theoretical questions completely, so further research is necessary. Meanwhile the following recommendations are presented.



## B. Policy implications/recommendations

There is no simple solution to the challenges faced by the Court during its interaction with States. Albeit, it is expectable, based on overarching themes that emerged from the data (proceedings and the monitoring), that the greatest challenges will occur in how the Court can leverage its capabilities to interact with different State strategies. Given the analyzed relationship between acquiescence and judgment compliance, the Court must regulate the procedural effects of acquiescence in a careful way to increase the rate of judgment compliance. Acquiescence is a procedural form that is insufficiently regulated by the Rules of the Court. However, regulation is possible because Article 62 of the Rules of Procedure allows the Court to rule upon the impact of acquiescence. In the same sense, the Convention grants the Court jurisdiction to consider procedural requirements, to decide to admit or reject acquiescence.

I propose five economically viable strategies within reach of the Court, which seek a productive, collaborative relationship between States and the Court. These strategies (summary in Table 1) follow the same logical flow as the five substantive parts in which the interaction between States and the Court was developed. Below there is a figure to show the five stages: signaling, exchange, negotiation, pressure, and sanctioning – with their respective Court strategies.



## **A. Signaling Stage**

States and the Court are the players in the proceedings and, of course, they understand the proper response and each can act accordingly. Under this view, States can predict the positive Court's reaction to the acquiescence and signal their commitment to protecting AUTHORITIES. The Court often falls prey to States that are particularly skilled at convincing the Court that good faith is the unique purpose for them to acquiesce. The Court must assure that acquiescence mirrors good faith before praising and legitimizing State actions.

The results showed that the Court accepts all offers of acquiescence. Thus, any proposal must consider that the responsibility is deep-seated within the Court system. The current reform seeks that the acquiescence translates into good faith efforts to comply with the Court judgments. In the same way, the change expects to end with the complacency of the Court that helps States (that have acquiesced) to gain control to the proceedings. I propose that a document setting out the State acquiescence shall contain a status or progress report on the situation of the alleged violation to be submitted to the preliminary consideration of the Court. With this measure, the Court leverages that especially at the beginning of the proceedings, States show much more inclination to satisfy the Court. Also, this proposal is based on current States and the Court actions, specifically, those demands for compliance used by the Court and States' logic to offer anticipatory remedial actions (see Stage 4).

Thus, the reform implies that once the Court analyzes the report, its decisions should urge the State to do something about the violation before admitting acquiescence and inform the other parties (the Commission, Victims, and their Representatives,

including, the Public Defender) to emit opinions. The Court can try to obtain from States, for example, a promise that restrictions and limitations on investigations and prosecutions will be restricted.

Given that this report would bring extra information about the violation, this proposal is supported by those members of the Court that have indicated that substantial understanding of a case depends on the details of the abuse. Moreover, the Court has made similar changes before, thus, nothing impedes adding an amendment in the sense proposed. By this change, the Court links to governance strategy and leverages the fact that States use acquiescence. This proposal also has the potential to achieve better results on the ground since it is the State who decides the best action to implement at -the first times of proceedings.

From a political perspective, such change may be viewed as less intrusive than a legislative proposal. The use of this report could ensure transparency about the real measures that the State is taking to manage the consequences of violation, and may provide an incentive to advance the implementation. In fact, domestic actors would have the capacity to influence state behavior by exerting pressure on the government to comply.<sup>10</sup> Their role in promoting compliance<sup>11</sup> was identified by their transnational

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<sup>10</sup> Judith Goldstein, *International law and domestic institutions: reconciling North American "unfair" trade laws*, INTERNATIONAL ORGANIZATION, 541-64 (1996).; Moravcsik, INTERNATIONAL ORGANIZATION, 225-29 (1997).speak of compliance constituencies that include, among others: lawyers, judges, members of the business community, national politicians (may favor legalized agreements to tie their hands in dealing with) domestic interest groups (whose demands they seek to resist or to bind their successors to policies they favor).

<sup>11</sup> The importance of providing incentives for domestic actors, as it was recognized by Raustiala & Slaughter, HANDBOOK OF INTERNATIONAL RELATIONS, (2002). Stone explains about the importance of individual actors in its theory of judicialized governance, developed on the basis of the growing role of courts in France, the EU and the WTO. Theory depends on the incentives of individuals to bring disputes before a third-party tribunal, the incentive of judges to maintain and maximize their legitimacy, the resulting creation and expansion of law, and the resulting likelihood that still more disputes will be framed in legal terms and brought before a third- party tribunal. This theory is presented in Alec Stone Sweet, *Judicialization and the Construction of Governance*, 31 COMPARATIVE

linkages with Courts in other systems.<sup>12</sup> Thus, material incentives must be able to motivate participation by domestic actors.<sup>13</sup> Incorporation of such incentives could result in judgments with interpretations that attract participation of domestic actors;<sup>14</sup> and would make the content of the violated norms more specific.

This reform would be enforceable by non-state actors (civil society, advocates, NGOs) that can pressure compliance. This advantage begs two questions: why all the norms and rules of the existing system have not been enforceable by non-state actors in connection with the high level of non-compliance and why States would allow non-state actors the use of this report. Particularly, given how NGOs preserve autonomy from State control, keeping their freedom of action to pressure compliance. These questions need to be answered with additional data.

In the case that the Court implements the proposal, some problems would be corrected or avoided. This change represents a cost of surveillance infrastructure. However, this loss can prevent the report from being joined to the preliminary

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POLITICAL STUDIES, 147-84 (1999). , and ALEX STONE, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (Oxford: Oxford University Press. 2000).

<sup>12</sup> Miles Kahler, *Conclusion: The causes and consequences of legalization*, 54 INTERNATIONAL ORGANIZATION (2000). The importance of domestic and transnational actors in enhancing compliance was recognized by Kahler in Judith Goldstein, et al., *Introduction: Legalization and world politics*, 54 INTERNATIONAL ORGANIZATION, 277-99 (2000).

<sup>13</sup> Regarding participation of public and private actors, Stone Sweet concluded that European constitutional courts enjoy social legitimacy due to their ability to draw 'an ever-widening range of actors, public and private', into normative discourse in STONE, *Governing with judges: constitutional politics in Europe* 149, 152. 2000. But the flipside is that social legitimacy is likely to be limited to those actors with the capacity to participate in legal discourse. Those who lack such capacity, as Kahler points out, are likely to resent and resist the expansion of law.

<sup>14</sup> Raustiala & Slaughter, *HANDBOOK OF INTERNATIONAL RELATIONS*, (2002). They question investigation of participation, without investigating the motivation behind it. They leave the following questions open: Yet what exactly motivates the formation of a compliance constituency? Is it the material benefits to be gained by actors whose interests are advanced through a particular international agreement? Or is it, as Stone Sweet would argue, the process of engaging domestic actors in ongoing discursive practices of explanation, justification and persuasion framed by both the existence of legal rules and a tribunal to interpret them? Are these two sets of variables interrelated? How can they best be harnessed as a matter of regime design to enhance compliance?

proceedings of objections. The streamlining of the proceedings can have positive outcomes. It will always be necessary to monitor carefully how the change affects both the overall course of the procedures and relevant individual steps, including the gathering of evidence and the hearings.

In the same view, it is necessary to prevent the government from changing unilaterally or creating some ambiguity on accountability regarding the report. The Court must be flexible to avoiding that States view the request as a coercive method, and the use of acquiescence is reduced. The feasibility of this proposed policy should be evaluated after three years. It needs to take into account that if year after year, States repeat their behaviors concerning anticipatory remedial actions, there is no reason not to believe that each subsequent year, more States would return with a report on the situation of the violation at the moment to propose acquiescence.

## **B. Exchange Stage**

States that acquiesce use requests to avoid the Court's exposure of information of AUTHORITIES and the Court often views that these requests economize the high processing volume of cases. The Court should assure that such requests do not become a strategy for restricting information about the role AUTHORITIES played in HR violation. Data demonstrated that in cases with acquiescence the streamlining helps to hide information about AUTHORITIES. For instance, it was impossible to find identifying information about implicated AUTHORITIES in 14 cases. Supporting the same point, the data shows that even when there is acquiescence, prosecute those responsible is possible. For instance, there is a range from 6 to 17 convictions in cases such as the Massacres: Mariparan, Dos Erres and Pueblo Bello and Myrna Mack and

Huilca Tecse cases. These sentences are related to having named responsible. Thus, the proposal is that Court incorporates narratives of acknowledged facts in acquiescence judgments that consistently require naming responsible AUTHORITIES.

**Table No. 1 Summary of the Court Strategies**

Stages of the Interaction	Government strategies	Court strategies	Advantages	Disadvantages	Potential area of use
Signaling	Save reputation	Requiring State report/progress in acquiescence instead of praising	<ul style="list-style-type: none"> <li>▪ Enforceable by non-state actors</li> <li>▪ Links the Court to governance strategy</li> <li>▪ Respect State boundaries</li> </ul>	<ul style="list-style-type: none"> <li>▪ May be changed unilaterally by government</li> <li>▪ May be viewed as coercive method to admit acquiescence</li> <li>▪ May diminish state use of acquiescence as a tool</li> <li>▪ Creates some ambiguity as to accountability</li> </ul>	Surveillance commitment in combination with meeting report requirement
Exchange	Restrict information	Naming responsibility in factual narratives instead of omitting	Enforceable by non-state actors	<ul style="list-style-type: none"> <li>▪ May be changed unilaterally by government</li> </ul>	Mechanism to ensure domestic prosecutions
Negotiation	Control scope of prosecution	Conditional agreements in ruling and compliance instead of endorsement executives agreements/reports	Respect boundaries	Limits to enforceability	Mechanism to transfer information to ICHR
Monitoring	Exonerate and law obstacles	Regulate a timely monitoring and memoranda of understandings instead of late demands	<ul style="list-style-type: none"> <li>▪ Respect constitutional boundaries</li> <li>▪ Flexible application</li> <li>▪ Capacity building</li> </ul>	Least enforceable	Standardization of behaviors a regional level
Sanctioning	Non-reporting	Mapping and deadlines to report OAS and use the UPR system (short time) instead of late enforcement measures	<ul style="list-style-type: none"> <li>▪ Enforceable</li> <li>▪ Clear designation of roles and responsibilities</li> <li>▪ Clear lines of accountability</li> <li>▪ May improve linkages and relations with other branches</li> </ul>	<ul style="list-style-type: none"> <li>▪ Dependent on existence of appropriate authority</li> <li>▪ May damage relations with other branches</li> <li>▪ Inflexible</li> </ul>	Mechanism to transfer information to ICHR Authority to oversee and guide response to ICHR

This proposal is possible because even when it is mandatory for the Court to decide the State liability without punishing perpetrators, as individual criminal responsibility is reserved for domestic courts; the use of factual descriptions of those responsible is not restricted to the Court. This proposal maybe does not work in all cases but in the subset of instances in which the barriers to prosecution are less entrenched.<sup>15</sup>

The Court should name not only violators but also name their persecutors. This alternative is because finger pointing HR violators make sense only if the Court receives support from domestic judicial authorities. As discussed in Chapter 3, it is possible that after States acquiesce (even in good faith), government institutions (such as judiciaries and prosecutors) within that State or those States refuse complying with the resulting judgment. In those cases, the Court needs to strengthen their linkages to that State's government institutions.

Appointing judges and prosecutors should consider a direct dialogue (without intermediation) since the beginning of the proceedings. Particularly, at the moment that the Court is investigating alleged violations (e.g., requesting a document directly from the institution in charge). To decide how and when to open a dialogue, the Court must be aware who is attempting to comply. It is the will of various institutional actors within the State (the executive, the judiciary –disaggregated into civil and military, the legislature, and the public ministry) that the order calls to action. So, to fully open a dialogue, the structural incentives and institutional cultural of these state actors must be taking into account.

Such a policy requires to be “attractive to judges and prosecutors, after the interaction, they can learn about the ICHR jurisprudence, feel more directly responsible

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<sup>15</sup> Huneeus, CORNELL INTERNATIONAL LAW JOURNAL, 143 (2011).

for compliance, and begin to identify as a part of the transnational judicial dialogue.”<sup>16</sup> Thus, if the Court implements this proposal about naming, it needs to observe carefully that their action does not alienate the inter-branches relationships. In addition, it needs to observe that each branch cannot reduce the information unilaterally.

A benefit of this strategy is that with information about the violation and violators in acquiescence judgments, the Court can restrict the States freedom of action as third parties are empowered to use this information to mobilize international and domestic pressure on governments that do not comply. These third parties are local advocates and non-state actors. In that sense, this information serves to replace the lack of enforcement mechanism of the Court.

### **C. Negotiation Stage**

States that have acquiesced used remedial actions to temper the Court judgments. These measures exhibit the State interests to redress the victims, comply with self-imposed obligations and control the outcomes. The data demonstrate that the Court has not made an active participation in the anticipatory remedial actions presented by States. On the contrary, the Court is limited to endorse them. However, there is a strong predisposition of the States to comply with the agreements reached in cases with acquiescence. In fact, this proposal is based on the data that exhibit that 15 out of 54 cases with acquiescence have a high compliance rate (72 to 100%) when States use anticipatory remedial actions. Thus, the Court can use (leverage) these agreements to produce compliance and to remain informed of the political considerations of existing law and jurisdictional boundaries of States. The Court can maximize the impact of these

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<sup>16</sup> Id. at, 144.



agreements on establishing conditions for them or by combining them with another strategy.

Regarding the use of agreements with particular conditions, these agreements should anticipate the consequences of operational difficulties that States face in implementing judgments and agreements. In addition, they must allocate resources to support efforts on compliance. For instance, they can contain special provision for one-fifth of OAS members that have lower-middle income such as periods to implement agreements, measures to support to help them build their capacity/know how, and individual initiatives to achieve standards set by the agreements.

Regarding the use of agreements with other strategies, a degree of flexibility is needed to incorporate in these agreements some severe obligations (like the judicial obligation) that are in general difficult for States. The existences of strict obligations are beneficial, but require some adjustment to be executable. These changes can be negotiated considering, for instance, that the poorest, least-developed countries need flexibility in the time they take to implement the judicial obligation (e.g., individual assistance and concessions). It is important to consider, that, lowering demands is a visible means of encouraging compliance with the Court obligations. Concerning 50% of OAS members that are developing countries and economies in transition more information will be necessary to know which conditions are required to achieve compliance with judicial obligations.<sup>17</sup>

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<sup>17</sup> For the current 2016 fiscal year, low-income economies are defined as those with a GNI per capita, calculated using the World Bank Atlas method. Low income \$1, 045 or less (Haiti); Lower-middle income \$1,045 to 4,125 (Bolivia, El Salvador, Guatemala, Guyana, Honduras and Nicaragua); Upper-middle income \$4,126 to 12,735 (Belize, Brazil, Colombia, Costa Rica, Dominican Republic, Dominica, Ecuador, Jamaica, Mexico, Panama, Granada, Paraguay, Peru, Suriname, St. Lucia, St. Vincent and the

#### **D. Monitoring Stage**

The Court should not discriminate States that have not acquiesced from those that do. If the Court grants rewards (such as a diminished control) all States must have that right. As analyzed in Chapter 3, the Court applied an intense control for States that have not acquiesced. My recommendation is that — to save costs to its legitimacy, the Court should see compliance-related issues in a broader perspective that transcends State individual views, consequently, accounts for the various interests of, and differences among OAS members. This proposal is based on cases with full compliance in which the Court makes a very intense (and early) monitoring.

Moreover, equal treatment should ensure a timely monitoring and avoid that States (that have acquiesced) can leverage the diminished monitoring to gain control to the outcome and that the impunity of AUTHORITIES sets firm roots. Indeed, cases with acquiescence for which monitoring began between 63-74 months had been open for more than 22 years since States have not complied with the domestic prosecution order. To bypass legal gaps contributing to impunity, memoranda of understanding could be used to block the use of means to exonerate the guilty and legal obstacles. The memoranda can be based on the UN Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International HR Law and Serious Violations of International Humanitarian Law, in particular, Principles 15-24, 59 and the Set of Principles for the Protection and Promotion of HR through Action to Combat Impunity, Principles 31-34.

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Grenadines); High income \$12,736 or more (Argentina, Bahamas, Barbados, Bermuda, Canada, Chile, Trinidad and Tobago, United States, Uruguay, Venezuela).

Regarding cases with acquiescence, the data revealed that impunity arises for 147 (out of 155) AUTHORITIES responsible for HR violations. In such instances, the use of guidelines on procedure and practice can play a role in educating institutions or State agents on how to face the impunity in topics like the accountability of subordinates; using non-judicial mechanisms; set the duty to prosecute; requirements for an effective domestic investigation and victims in the investigation.

These measures serve to maximize the potential of some actions that States are performing and minimizing those steps that are limiting compliance with the judicial obligation. They are not invasive in political terms, and they can be rapidly modified to cover changes and challenging situations, however, are not binding, thus, likely to be effective when combined as a first step with other measures.

#### **E. Sanctioning Stage**

The application of enforcement measures does not follow specific criteria. These measures are applied very late to States that acquiesced. In fact, when these measures are applied, States have used exculpatory means. Thus, States are currently leveraging the late application in order to protect high-ranking authorities. Two proposals are presented specifically intended to ameliorate this problem.

The Court must give equal treatment among States as it was contemplated in the prior reform. In this way, my first recommendation is that the Court should set a deadline for reporting noncompliance to the OAS GA.

As my analysis showed in Chapter 1 and 3, the OAS GA should assume the role of Enforcer to the Court System — even though, neither exercises its powers to that end. Recall that the GA was empowered to discuss the cases in which States are in

noncompliance and adopt political measures against them. I.e., the political bodies of the OAS have no interest in pursuing noncompliance cases. Unfortunately, the fact that the GA has never discussed the reported noncompliance becomes a constant characteristic of the current Court System.<sup>18</sup>

This absence of political debate (to support judgment compliance) could be filled out it through legislative changes concerning the duties of OAS ambassadors. However, any legal approach tends to be viewed as intrusive. Moreover, States that assert their independence and sovereignty often obscure the consensus that the legislative approach requires to be successful. This core issue cannot be divorced from the attitude of governments by which the Court's repeated demands to make the GA's pronouncements/discussions **obligatory**<sup>19</sup> and to work into a new body of monitoring that replaces the Court in its surveillance functions<sup>20</sup> remain unanswered after 15 years. The ICHR seems to need the power to enforce judgment compliance and to be more than good intentions supported by a weak System.

This is why my proposal is destined to add deadlines for reporting to the OAS affect that problem in the system. Since the data demonstrate that States tend to comply during the first years of the monitoring. Concurrently, during the first years of the monitoring, the Court cases received high public attention. The data also reveals that

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<sup>18</sup> The XXIV Congress of IHLADI addressed this problem (Instituto Hispano Luso Americano Filipino de Derecho Internacional). The congress was held in September 2006 in Granada, Spain.

<sup>19</sup> CACADO TRINDAE, ANTONIO ET VENTURA ROBLES, MANUEL, El Futuro de la Corte Interamericana de Derechos Humanos, 3era. Edición, San José, Costa Rica, 2005. (As indicated by the honorable Judge ANTONIO CACADO TRINDAE, Article 65 could be modified by adding the following text: "The General Assembly will send it to the Permanent Council, who will study the matter and prepare a report so that the General Assembly may deliberate.")

<sup>20</sup> Cavallaro & Brewer, AMERICAN JOURNAL OF INTERNATIONAL LAW, 784 (2008). ("the salience of the lack of a permanent monitoring body in the OAS becomes apparent when one considers [the high percentage of cases that remain in the phase of supervision of compliance...] [...] [which increase year after year]", sparking questions about the viability of the monitoring process.)

States fear to be exposed to the public opinion (as the stage 2 makes clear). Thus, it is feasible that the Court can leverage this period (of 24 months) to put pressure on States. States will know that at the moment in which the measures are applied - the public opinion will be yet participative. The idea of this proposal is to obtain compliance by combining the possibility to turn visible the noncompliance in the correct moment. This plan assumes that the intergovernmental level with States in the OAS is uninterested in discussing noncompliance, but, it is also true that when noncompliance of States was reported to the OAS early, States opt to take measures to avoid publicity. It happened, for instance, when the Court included a resolution detailing Ecuador's noncompliance in its second monitoring process, which it expected to present to the GA of the OAS. Ecuador started an inter-State lobbying to prevent the submission of the ICHR report.<sup>21</sup> Despite, Ecuador complied promptly with its outstanding reparations to avoid the public exposition.

This proposal seeks, thus, States can fully anticipate both the benefits of compliance and the consequences of noncompliance — to choose the best option. Also, it seeks the proper balance between stability and predictability in the application of enforcement measures. In this way, the Court can avoid considerations of what is fair or unfair in each case.

The system needs clearly defined timetables for completing operations and responsibilities. These deadlines are necessary for both anticipating and ensuring compliance in the term in which a case should be deliberated. The chart below shows the

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<sup>21</sup> Benavides Cevallos v. Ecuador (Monitoring Compliance) ICHR, 27 November 2003, decidendi 3.; Annual Report 2003 – Chapter III <[www.cidh.org/annualrep/2003eng/chap.3k.htm](http://www.cidh.org/annualrep/2003eng/chap.3k.htm)>

new stages in the proceedings as a consequence of the strategies proposed, including the terms of the application of enforcement.

#### STRATEGIES TIMETABLE

<b>At 2 months</b>	Proceedings	State action report after acquiescence or with acquiescence
<b>At 3 months</b>		Consultations and observations
<b>At 6 months</b>		Propose conditional agreements
<b>At 9 months</b>		Parties adopted final agreement
<b>At 10 months</b>		Memoranda of understandings endorses by the Court and States
<b>At 12 months</b>		The issuance of Judgment
<b>At 36 months</b>	Monitoring	Application of enforcement measures

The State's willingness to make efforts to comply can be affected by the potential visibility of their noncompliance. In fact, States recognized as a threat that the Court could include a resolution detailing State noncompliance in its yearly report to OAS. In effect, as noted in Chapter 3, States lobbied in a political campaign to avoid the measure and even threatened to withdraw their acceptance of the Court jurisdiction before the report was submitted. This is why my second reform proposes that the deadlines for reporting noncompliance to the OAS GA should be complemented with including the report that informs such noncompliance in each country's Universal Periodic Review (UPR).<sup>22</sup> The UPR hinges on States' compliance with the commitments assumed during the review that States make every fourth year. In this way, reports on noncompliance of ICHR are publicly disseminated and place States under the state's peer's pressure, which eventually damage their moral stand and reputation.<sup>23</sup>

The appeal to the UPR proposing moving ICHR noncompliance out of the ICHR system into the broader UN system, which (1) might be seen as an admission that the ICHR system is not capable of handling its noncompliance (alone). Also, (2) assumes the

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<sup>22</sup> A/RES/60/251, 3 April 2006. By the UPR, all State members of the United Nations must undergo the periodic scrutiny of their HR policies and practices, each review containing reports by the country concerned

<sup>23</sup> This exemplification should be carried out in conformity with letter d) of Decision 6/102 and Article 2d) of Resolution 5/1.

UPR process produces better compliance with HR obligations by states (at best a debatable assumption). However, this proposal can overcome these obstacles if both systems work together effectively since even when there are certainly differences between the UPR and ICHR processes; they share concern for HR and collaborative structure,<sup>24</sup> making easily interaction with reporting systems.<sup>25</sup>

The Palamara (Chile) case provides an example when during the UPR review it cited the country's political reality as a hindrance to align the domestic law system with international standards regarding military criminal jurisdiction that the judgment issued by the Court in 2005 demanded.<sup>26</sup> During the UPR review, the state reported that proposal and approval of legal reformation of military justice have been delayed by difficulty reconciling with members of the military regime. So, compliance was impeded by the inability to reach a political agreement during the Bachelet administration and by the Piñera administration's lack of political will. 11 countries made recommendations about this situation, that: the Code of Military Justice be brought into alignment with international human rights norms;<sup>27</sup> the provisions pertaining to court-martials in times of peace be revised<sup>28</sup> and; extension of military law to civilians should be avoided.<sup>29</sup> One country recommended eliminating military law.<sup>30</sup> Repeal<sup>31</sup> and/or modification of the

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<sup>24</sup> General Assembly Resolution 60/251, A/RES/60/251, April 3, 2006

<sup>25</sup> The European and Inter-American Courts of HR are more focused on judicial processes than policy. However, the HRC (which oversees the UPR) is more concerned with policy. Interaction between the two should become commonplace, thereby improving the overall system.

<sup>26</sup> Palamara Iribarne v. Chile (Merits, Reparations and Costs) ICHR, 22 November 2005, Ser. C No 73, para 2, resolution 14.

<sup>27</sup> Recommendation made by the following states: Nicaragua; Argentina; Switzerland

<sup>28</sup> Recommendation made by the following state: France

<sup>29</sup> Recommendation made by the following states: Canada; Switzerland; Azerbaijan; Argentina; Czech Republic

<sup>30</sup> Recommendation made by the following state: Argentina

<sup>31</sup> Recommendation made by the following state: Italy

Amnesty Law applied to perpetrators of human rights abuses were requested.<sup>32</sup> Chile complies with the Court's obligation before that a new UPR started.

These policies are feasible as they depend on the practices of the Court to make an equal and rigorous application of the enforcement measures along with the use of the appeal to the UPR as a complement. If these proposals were followed, their effect on compliance should also be analyzed.

### ***Other proposals to implementation and monitoring***

The Court must avoid remoteness that makes it “appear out of touch with [the day-to-day] realities [of each country].” The Court System requires an additional mechanism that allows the Court to pay attention to the factors behind noncompliance. The Court has little access to compliance information and what States do have is self-reported. Ongoing challenges such as surveillance are likely to be handled better through more collaborative approaches that combine with linkages with domestic institutions. A two-level, domestic-international linkage mechanism is necessary. It connects sets of domestic players with a third-party (the ICHR) to trigger enforcement strategy and reinforce cooperation.

In this way, one of the Court's current members could be nominated as a visiting judge who travels to each State's headquarters at least once a year to glean in situ insight into national implementation processes and provide technical advice based on historical regional best practices. The visiting judge can obtain unfiltered information from monitored States. The knowledge gleaned by the visiting judge could gradually translate into monitoring that is consistent with State realities. Links between the ICHR and

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<sup>32</sup> Recommendation made by the following state: Canada



domestic institutions could be established to overcome the tensions created by enforcement actions.<sup>33</sup>

The visited system is complemented with an adequate domestic institution. Each State should establish a permanent inter-institutional, ministerial body –comprised of ministers of the executive branch, representatives from the judicial and legislative branches as well as the victims – to coordinate ICHR judgment implementation. Such a body would report twice a year on progress on ICHR processes. This single body within every States has the responsibility to communicate to the Court about the situation of HR alleged.

This proposal is based on examples of collaboration between the States and the ICHR. First, inter-ministerial commissions were established to coordinate implementation. Second, via decree number 1595, approved on February 26, 2009, Paraguay created a committee composed of 16 State entities.<sup>34</sup> The following States have followed one of the two options: El Salvador, Paraguay, Colombia, Argentina, and Suriname.

For instance, in the Serrano Cruz (Salvador) case it was approved on February 6, 2006, an Inter-Institutional Commission to trace disappeared children during the armed conflict with the participation of two Ministers; one member of the Policy forces; one

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<sup>33</sup> Conventions that demand the establishment of a domestic mechanism for the implementation of treaties already exist. For example, Article 3 of the Optional Protocol of the Convention against Torture relative to the periodic visits to places where there are persons deprived of liberty, stipulates that “[e]ach State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment.)” Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, 2375 U.N.T.S. 237, art. 3, GA Res. A/RES/57/199 (entered into force 22 June 2006).

<sup>34</sup> See Paraguay’s Ministry of the Interior online: <[www.cej.org.py/files/decreto1595\\_ComisionInterinstitucionalCumplimientoSentenciasInternacionales.pdf](http://www.cej.org.py/files/decreto1595_ComisionInterinstitucionalCumplimientoSentenciasInternacionales.pdf)>.

academic; one persecutor and one procurator.<sup>35</sup> In Goiburú (Paraguay) case, the State informed that the Inter-Institutional Working Team has been created to fully and comply efficiently with the terms ordered in the Judgment.<sup>36</sup> In the Mariparan Massacre (Colombia) case was designated an official mechanism to monitor the judgment ordered by the Court by an Act of the Intersectorial Commission on HR. The act dated February 28, 2006.<sup>37</sup> In the Garrido (Argentina) case, an ad hoc Investigation Commission was created to carry out the investigation ordered by the Court.<sup>38</sup> Finally, in the Moiwana (Suriname) case, the State creates some entities to guarantee “an effective and efficient implementation” of the Judgment. These institutions are a Ministerial Coordination; Commission of HRs; Working Groups; Foundation; National Commission on Land Rights (NCLR), responsible for an integral approach to the land rights; Coordination Team that include a mechanism for periodic visits.<sup>39</sup>

System experiences set the basis for the proposal that would demonstrate how coordination is necessary for compliance. However, it is true that this long-term plan poses challenges and its feasibility must be evaluated in terms of resources, time, impartiality, security, and so on.

### **III. LIMITATIONS OF THE STUDY**

Before turning to the further research of the study, it is important to acknowledge some limitations encountered during the sampling. This research focused on the 129 listed cases in the Inter-American Court’s 2010 Annual Report. The Court has ruled 216

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<sup>35</sup> The Serrano Cruz sisters v. El Salvador (Monitoring) ICHR, 22 September 2006, para. 4

<sup>36</sup> Goiburú v. Paraguay (Monitoring) ICHR, 6 August 2008, para. 7

<sup>37</sup> Mariparan Massacre v. Colombia (Monitoring) ICHR, 26 November 2008, considering 8

<sup>38</sup> Garrido v. Argentina (Monitoring) ICHR, 27 November 2007, considering 6 (b) (1)

<sup>39</sup> Moiwana v. Suriname (Monitoring) ICHR, 21 November 2007, para. 4

cases as to 2014. There is a need to update the cases since more than half of all acquiescence has occurred since 2005, thus, there was data about acquiescence that was not available at 2010. In consequence, even when these 129 cases provide enough to test patterns of interaction, the use of all instances would strengthen the empirical results of this research.

Another limitation that was encountered in the codification was that the project was focused on two actors: States and the Courts. The reason was that if in the study all the players in the interaction were considered, the amount of data could become unwieldy. For this reason, there is also a need for integrating more players to allow further assessment of their participation in the interaction. A full picture requires considering the following actors: The Inter-American Commission on HR, Victims including their Representatives, and non-state actors (including, especially NGOs and when the NGOs are in particular representatives of victims). The idea is to deepen understanding of other relationships, for instance, if the Courts can give a role to the pressure by empowering non-state actors to encourage State compliance or the relationship between compliance and NGOs. Addressing the work of particular NGOs would allow knowing if the NGOs do respond to the ICHR or the Victims if the NGOs work in communication with others States, and of if they pay attention all States equally, or unevenly. Or even, corroborating if NGOs have deflected their attention from cases with the acquiescence and overlooked to put international pressure campaigns able to leverage strategic moments for advocacy. In such instances, an additional question relates to whether NGOs exhibit similar patterns to the Court if they frame their interests

differently to affect compliance, and if they interconnect to influence the distribution of power of States and the Court.

Moreover, I erroneously employed three codes in the early stages of coding my data. These three codes were: violation, obligation, and institution. These three codes collect descriptive information for all judgments within a case. However, I did not realize the importance of using them as attributes of the data when I coded. When I realized the pervasiveness of them to make comparisons, filter cases and identify patterns of association between cases, it was very late in the process. These three codes contain abundant information, thus, they can complement the current results or be used as part of quantitative studies. For instance, a way to take advantage from my database is to connect the information of these three attributes with information gathered from the victims by survey/interview.

Despite these limitations, there is abundant data gleaned from this project that was set aside in order to focus on the central finding of this dissertation. Likewise, subsequent studies are needed to test the accuracy of the presented findings, and their generalizability in other proposals and to other States and Courts.

In summary, this Chapter has presented some possible responses the ICHR system could take to address the problems that my analysis has identified. First, these possible responses are not anchored in theories. Rather they are based on what problems the proposals were specifically intended to ameliorate. These responses map to the patterns my data produced concerning the nature and structure of the interaction between States and the ICHR and the analytical framework I used to explain the patterns, making my normative proposals more accessible for the reader.

Second, the data facilitate the understanding of how, in the ICHR's experience with noncompliance, cooperation ex-post is not working in all instances. Thus, it becomes necessary to extend substantively from the stale and dominant “paradigm of assistance and deterrence” (the well-known carrots and sticks)<sup>40</sup> into joining preventative control measures (even in a better way) with emerging, nuanced modes of international engagement and negotiation that should be opportune, impartial and enforced.

Third, the contribution of my analysis is to be a required understanding for changing the Inter-American Court system. Just as the Americas built this System, the watchdogs of the Americas (such the Court) can improve upon it; in effect, the Court can reinvigorate their practices and thus, have a role in changing the process of compliance and unprogressive HR situation (of noncompliance) among members of the OAS. Also, the Court has a role in solving its substance and in devising shared understandings to future regime agenda. In effect, this Chapter focused on proposals that depend on the Court’s exercise of its powers since it is a variable component of the System of compliance that allows changes.

Fourth, and relatedly, I proposed substantial statutory and political reforms that considered the interaction between States and the Courts to show that the Courts might be able to thwart State efforts to use acquiescence (and others actions) as a tool to protect high-ranking authorities from the responsibility of States through strategies. By using these alternatives, the Courts potentially counteract damaging aspects of State strategies and leverage them (to control noncompliance). The expectation is that the Court can provide a frame of discussion about changes. This is why all my proposals appeared procedural in nature – entail that if the Court would modify procedures in a certain way

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<sup>40</sup> Raustiala & Slaughter, *HANDBOOK OF INTERNATIONAL RELATIONS*, 552 (2002).

(e.g., requiring reporting in cases of acquiescence), then compliance would increase. The data reveal that when the Court changes the context in which the State preferences are formed, then the preferences and outcomes also vary (see stage 2 in Chapter 3). It is, for example, feasible that the Court produces sub-processes for promoting changes when there is a deeply entrenched political interest in not complying with ICHR judicial obligations. The Court's ability to overcome the impunity by itself is an unrealistic expectation of Courts as international actor. Considering that impunity derives from historical, ethnic, politics, social, and ideological tensions which cannot even be resolved through bilateral efforts.

Fifth, and for now, all my proposals focus on what the court can do to counteract during the Court proceedings and monitoring processes State strategic actions since those proposals that rely on collective efforts of States members of the OAS are uncertain. They are uncertain since additional data is required to address problems/noncompliance at the State level, inter-State level, and the intergovernmental level.<sup>41</sup> The Court is between noncompliance at the state level and the lack of political willingness at intergovernmental level to confront noncompliance (e.g., States in the OAS uninterested in discussing noncompliance and this is why the OAS General Assembly “has never discussed the reported noncompliance”). Thus, the data also suggest that the problem of noncompliance is far more than a function of what the court does nor does not do. Given

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<sup>41</sup> For now, the presented proposals do not address noncompliance at the State level, inter-State level, nor the lack of political willingness at intergovernmental level to confront noncompliance in the ICHR system since that it is necessary to explore the following types of relationships. There is a need to elaborate on the relationship between impunity, structural impunity and level of compliance regarding each State member of OAS (measure to assess the impunity) to address problems at the State level. It is equally necessary to elaborate on the partnership among States concerning the Inter-American HR System to address problems at the inter-State level. Likewise, it is a need to elaborate on the participation of States (embassadors OAS) in the political debates of the OAS, in the relationship between the Court and the OAS about other matters, in the relationship between the Court and States outside of contentious cases, to address problems at the intergovernmental level.

the seriousness of these problems, future proposals for reform should make some attempt to address them.

Finally, whatever the combination of alternatives used by the Courts, their ultimate success will depend on the development of appropriate desire, capacity, and working relationships at all levels of the interaction with States.

## Appendix A.

<b>Only Objecting</b>	<i>No.</i>	<i>Name of the Case</i>	<i>State</i>	<i>Year</i>
	1	Neira-Alegría et al.	Peru	1996
	2	Loayza-Tamayo	Peru	1998
	3	Castillo-Páez	Peru	1998
	4	Castillo-Petruzzi	Peru	1999
	5	<b>Paniagua Morales</b>	<b>Guatemala</b>	<b>2001</b>
	6	The “Street Children”	Guatemala	2001
	7	Mayagna Awas	Nicaragua	2001
	8	Baena	Panama	2001
	9	<b>Ivcher-Bronstein</b>	<b>Peru</b>	<b>2001</b>
	10	Constitutional Court	Peru	2001
	11	Cesti-Hurtado	Peru	2001
	12	Cantoral-Benavides	Peru	2001
	13	Durand and Ugarte	Peru	2001
	14	Cantos	Argentina	2002
	15	Hilaire	Trinidad	2002
	16	<b>Juan H. Sánchez</b>	<b>Honduras</b>	<b>2003</b>
	17	Five Pensioners v. Peru	Peru	2003
	18	<b>19 Tradesmen</b>	<b>Colombia</b>	<b>2004</b>
	19	Herrera Ulloa	Costa Rica	2004
	20	Tibi	Ecuador	2004
	21	The Yean and Bosico Girls	Dominican Republic	2005
	22	Yatama	Nicaragua	2005
	23	<b>The Serrano Sisters</b>	<b>Salvador</b>	<b>2005</b>
	24	<b>Moiwana</b>	<b>Suriname</b>	<b>2005</b>
	25	Almonacid Arellano	Chile	2006
	26	<b>The Pueblo Bello Massacre</b>	<b>Colombia</b>	<b>2006</b>
	27	<b>Dismissed Congressional Employees</b>	<b>Peru</b>	<b>2006</b>
	28	Boyce	Barbados	2007
	29	García Prieto	Salvador	2007
	30	Saramanka People	Suriname	2007
	31	Bayarri	Argentina	2008
	32	Castañeda Gutman	Mexico	2008
	33	<b>Heliodoro Portugal</b>	<b>Panama</b>	<b>2008</b>
	34	Apitz Barbera	Venezuela	2008
	35	Dacosta Cadogan	Barbados	2009
	36	<b>Escher et al.</b>	<b>Brazil</b>	<b>2009</b>
	37	Garibaldi	Brazil	2009
	38	Tristan Donoso	Panama	2009



39	<b>Anzualdo Castro</b>	<b>Peru</b>	<b>2009</b>
40	Acevedo Buendía	Peru	2009
41	Reverón Trujillo	Venezuela	2009
42	Usón Ramírez	Venezuela	2009
43	Ríos et al.	Venezuela	2009
44	Perozo et al	Venezuela	2009
45	<b>Gomes Lund</b>	<b>Brazil</b>	<b>2010</b>
46	Cabrera Garcia	Mexico	2010

#### **Doing Nothing**

<i>No.</i>	<i>Name of the Case</i>	<i>State</i>	<i>Year</i>
1	Suárez Rosero	Ecuador	1999
2	The last temptation of Christ	Chile	2001
3	Ricardo Canese	Paraguay	2004
4	De la Cruz-Flores	Peru	2004
5	Gómez-Paquiyaui	Peru	2004
6	Lori Berenson-Mejía	Peru	2004
7	Palamara	Chile	2005
8	Acosta Calderon	Ecuador	2005
9	Raxcacó Reyes	Guatemala	2005
10	Fermín Ramírez	Guatemala	2005
11	The Yakyé Axa	Paraguay	2005
12	Caesar	Trinidad	2005
13	Claude Reyes	Chile	2006
14	López Álvarez	Honduras	2006
15	Yvon Neptune	Haiti	2008
16	Barreto Leiva	Venezuela	2009

#### **Objecting & Acquiescing**

<i>No.</i>	<i>Name of the Case</i>	<i>State</i>	<i>Year</i>
1	Caballero	Colombia	1997
2	<b>Blake</b>	<b>Guatemala</b>	<b>1999</b>
3	<b>Trujillo Oroza</b>	<b>Bolivia</b>	<b>2002</b>
4	<b>Las Palmeras</b>	<b>Colombia</b>	<b>2002</b>
5	<b>Bámaca Velásquez</b>	<b>Guatemala</b>	<b>2002</b>
6	<b>The Plan Sanchez</b>	<b>Guatemala</b>	<b>2004</b>
7	<b>Molina-Theissen</b>	<b>Guatemala</b>	<b>2004</b>
8	The Children's Institute	Paraguay	2004
9	<b>The Mapiripan Massacre</b>	<b>Colombia</b>	<b>2005</b>
10	<b>Gutierrez Soler</b>	<b>Colombia</b>	<b>2005</b>
11	<b>Garcia Asto</b>	<b>Peru</b>	<b>2005</b>

12	Ximenes Lopez	Brazil	2006
13	<b>Ituango Massacres</b>	<b>Colombia</b>	<b>2006</b>
14	<b>Acevedo- Jaramillo</b>	<b>Peru</b>	<b>2006</b>
15	<b>Montero Aranguren</b>	<b>Venezuela</b>	<b>2006</b>
16	<b>Myrna Mack Chang</b>	<b>Guatemala</b>	<b>2003</b>
17	Chaparro Alvarez	Ecuador	2007
18	<b>Cantoral-Huamani</b>	<b>Peru</b>	<b>2007</b>
19	<b>Dos Erres Masacre</b>	<b>Guatemala</b>	<b>2009</b>
20	Campo Algodonero	Mexico	2009
21	<b>Radilla Pacheco</b>	<b>Mexico</b>	<b>2009</b>
22	<b>Cepeda Vargas</b>	<b>Colombia</b>	<b>2010</b>
23	<b>Chitay Nech</b>	<b>Guatemala</b>	<b>2010</b>
24	<b>Fernandez Ortega</b>	<b>Mexico</b>	<b>2010</b>
25	<b>Rosendo Cantu</b>	<b>Mexico</b>	<b>2010</b>
26	Velez Loor	Panama	2010

**Only  
Acquiescing**

<i>No.</i>	<i>Name of the Case</i>	<i>State</i>	<i>Year</i>
1	<b>Amparo</b>	<b>Venezuela</b>	<b>1996</b>
2	<b>Garrido</b>	<b>Argentina</b>	<b>1998</b>
3	Benavides-Cevallos	Ecuador	1998
4	<b>Barrios-Altos</b>	<b>Peru</b>	<b>2001</b>
5	<b>El Caracazo</b>	<b>Venezuela</b>	<b>2002</b>
6	<b>Bulacio</b>	<b>Argentina</b>	<b>2003</b>
7	<b>Maritza Urrutia</b>	<b>Guatemala</b>	<b>2003</b>
8	<b>Carpio Nicolle</b>	<b>Guatemala</b>	<b>2004</b>
9	<b>Gomes-Palomino</b>	<b>Peru</b>	<b>2005</b>
10	<b>Huilca-Tecse</b>	<b>Peru</b>	<b>2005</b>
11	<b>Blanco-Romero</b>	<b>Venezuela</b>	<b>2005</b>
12	<b>Servellon-Garcia</b>	<b>Honduras</b>	<b>2006</b>
13	<b>Goiburú</b>	<b>Paraguay</b>	<b>2006</b>
14	The Sawhoyamaxa	Paraguay	2006
15	Vargas-Areco	Paraguay	2006
16	<b>La Cantuta</b>	<b>Peru</b>	<b>2006</b>
17	<b>Baldeón-García</b>	<b>Peru</b>	<b>2006</b>
18	<b>Miguel Castro-Castro</b>	<b>Peru</b>	<b>2006</b>
19	<b>Bueno Alvez</b>	<b>Argentina</b>	<b>2007</b>
20	<b>Rochela Massacre</b>	<b>Colombia</b>	<b>2007</b>
21	<b>Escue Zapata</b>	<b>Colombia</b>	<b>2007</b>
22	<b>Zambrano Velez</b>	<b>Ecuador</b>	<b>2007</b>

23	Alban Cornejo	Ecuador	2007
24	Kimel	Argentina	2008
25	<b>Ticona</b>	<b>Bolivia</b>	<b>2008</b>
26	<b>Valle Jaramillo</b>	<b>Colombia</b>	<b>2008</b>
27	<b>Tiu Tojin</b>	<b>Guatemala</b>	<b>2008</b>
28	<b>Kawas</b>	<b>Honduras</b>	<b>2009</b>
29	<b>Ibsen Cardenas</b>	<b>Bolivia</b>	<b>2010</b>
30	The Xakmok	Paraguay	2010

\* Bold indicates a case's membership in the sample that included AUTHORITIES

# RELATIONSHIP ACQUIESCENCE AND COMPLIANCE

## PROCEEDINGS

## MONITORING

Stage 1: SIGNALING

Stage 2: EXCHANGE

Stage 3: NEGOTIATION

Stage 4: PRESSURE

Stage 5:  
SANCTIONING

STATES

COURT

STATES

COURT

STATES

COURT

STATES

COURT

STATE

COURT

doing  
nothing

objecting

acquiescing

praising

rewarding

requesting

endorsing

restricting

declaring

remedying

considering

endorsing

strategic  
compliance

restricting  
and limiting  
investigation

demanding

non-reporting

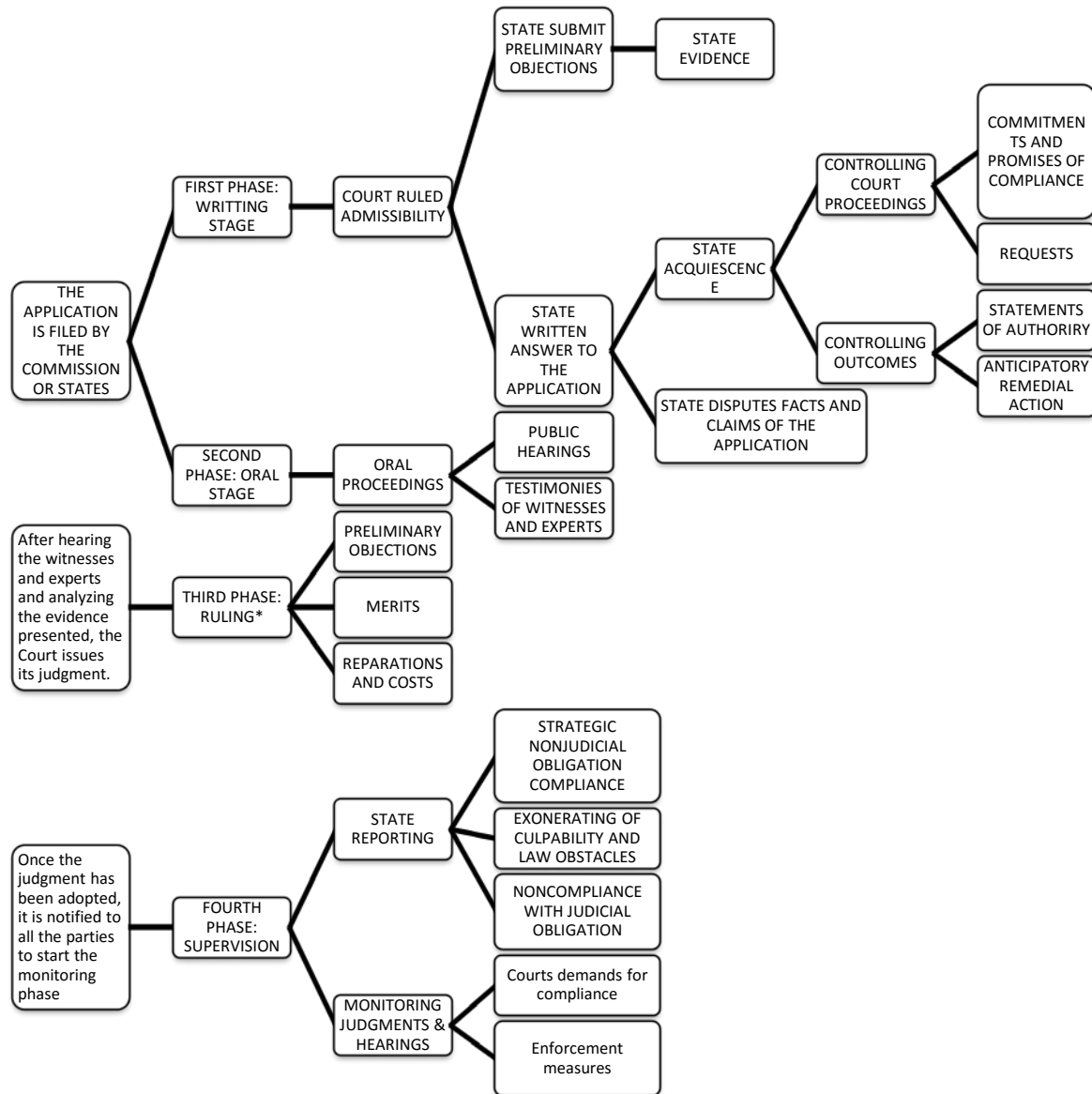
enforcing

The following schema lists the initial codes:

- I. The Compliance Outcomes
  - A. **Full Compliance, Partial Compliance & Noncompliance**
    - 1) Toward compliance
    - 2) Away from compliance
    - 3) Unresolved issues of compliance
      - a) Tending toward & Tending away
- II. Judgment Attributes
  - A. **The type of violation in each case**
    - 1) Physical integrity rights
    - 2) Political and civil rights
    - 3) Social, economic and cultural
    - 4) Justice
    - 5) Privacy and property rights
  - B. **State institution invoked & type of obligation imposed**
    - 1) Executive
      - a. Reparations
      - b. Socio-educational
      - c. Symbolic-cultural
      - d. Case-specific changes/Re-establishing civil & political rights
      - e. Policy changes/Non-repetition
    - 2) Non-executive
      - a. Legislative changes/Non-repetition
      - b. Judicial accountability
- III. State responses and Court requests
  - A. Remedial State words
    - 1) **Accepting responsibility**
      - a. **With High-ranking authorities/covering-up & without**
      - b. **Total & Partial**
      - c. **Early & Later**
      - d. **Limited statements of responsibility**
    - 2) **Signaling**
      - a) **Normative commitment**
      - b) **Promising compliance**
        - a. Requesting inter-branch pro-compliance alliances”
        - b. Never fulfilled due to other State motives
    - 3) Arguing that hands are tied
      - a) **Law obstacles: amnesty, prescription, non in bis in idem**
      - b) **Others like sovereignty**
    - 4) Requests for compliance and control
      - a) Time, information, economic issues based on government capacity/incapacity to respond effectively
      - b) **Cover-up or to frame the Court proceedings**
  - B. Remedial State actions
    - 1) **Anticipatory**
    - 2) Actions other than those ordered
    - 3) Institutional or political resistance
      - a) Silence (“the bitter pill”)
        - a. Intermittent
        - b. Prolonged to Permanent

- 4) State-consent enforcement actions like overreach
    - C. Statements of Court
      - 1) Statements of authority & responsibility
      - 2) **Demands for compliance**
    - D. Actions of Court authority
      - 1) Problem-solving actions
        - a) Dispute settlement assistance
        - b) Enforcing agreements
        - c) Negotiating with States about compliance
      - 2) **Enforcement actions**
        - a) **Overreaching the jurisdiction and the quasi judicial-review**
        - b) **Referrals and making a formal appeal to others at higher levels in the organization**
- IV. State-Court Relationship
  - A) Impact (strategies)
    - a) Rational Persuasion
    - b) **Pressure, including emotional appeals**
    - c) **Negotiation (exchange)**
    - d) **Upward appeals/sanctions/blocking**
    - e) **Signaling & Praising**
    - f) Coalition/alliance
    - g) Conserving status quo
    - h) Disengagement

## Appendix C.



\*Once submitted to the jurisdiction of the Inter-American Court, a case will proceed through a jurisdictional, or preliminary objections stage, followed by a merits stage, a reparations and costs stage, and monitoring. It is now common for the Court to resolve all three stages of litigation (preliminary, merits and reparations and costs) in one written decision published after a single public hearing and a judgment decision then enters into a compliance phase.

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